



Law of Administrative Procedure of the European Union

European Added Value Assessment

October 2012

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23 October 2012

On 26 March 2012, the **Committee on Legal Affairs** (JURI) requested a European Added Value Assessment (EAVA) to support its work on the legislative initiative report of Mr Luigi Berlinguer with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)).

In its report, JURI calls on the Commission to submit a proposal for a Regulation, based on art 298 TFEU, on a single, general European Law of Administrative Procedure binding on the Union's Institutions, bodies and agencies and providing a minimum safety net of guarantees to citizens and economic operators in their direct dealings with the Union's administration. The arguments in favour of this approach are set out in detail in this European Added Value Assessment.

This paper has been undertaken by the **European Added Value Unit** of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Internal Policies (DG IPOL) of the General Secretariat of the European Parliament.

This assessment builds on the work carried out by the Working Group on Administrative Procedure, established by the Legal Affairs Committee, as well as on expertise commissioned specifically for the purpose of this Assessment, provided by:

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- Professor Jacques Ziller
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Executive Summary

Article 298 TFEU and the Charter of Fundamental Rights establish a right of citizens to good administration. However, the current legal framework is fragmented, patchy and uneven and the detailed provisions needed to enforce this right are lacking.

This assessment argues that a Regulation constituting a general Law of Administrative Procedure would bring significant added value and would:

- clarify the main **principles** and procedural **standards**;
- ensure clearer rights and provide more **legal certainty** to citizens and economic operators, who would benefit from uniform procedural guarantees, enforceable in Courts, in their relations with all EU institutions;
- contribute to a more **efficient** EU administration and bring about **cost savings**, as proper standards of administration save time, costs and burdens;
- enhance **trust** and improve the relationship between the citizen and the EU administration, by increasing its transparency and accessibility, thereby enhancing also the **legitimacy** of the EU.

Article 298 TFEU provides a suitable legal basis for the adoption of comprehensive rules on good administration.

1. The context for the measure: the need for action at EU level

1.1 The legal basis

Despite its importance, the detailed meaning of 'good administration' at EU level has remained largely undefined. Many problems are not addressed at all or only at such a general level that the provisions are of a limited practical use for citizens. Ambiguous standards cause problems, affecting the relationship between the citizens and the EU administration. The Treaty of Lisbon and the emphasis given in the new Treaty framework to fundamental rights and citizens' participation give these considerations particular importance.

Good administration as a right of citizens is enshrined in the EU Charter of Fundamental Rights (CFR), which, after the entry into force of the Treaty of Lisbon, has the same legal value as the Treaties. According to Article 41 CFR par 1 "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*"

The Treaty of Lisbon introduced a new legal base, Article 298 TFEU, which provides that:

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

The suitability of this legal basis to legislate on general administrative principles and rules is beyond doubt. The interpretation of the wording of Article 298 to the effect that it refers to administration within the institutions, instead of regulating the relationship between the institutions and the public, is to be dismissed: the Treaty already includes other possible legal bases for the adoption of the institutions' own Rules of Procedures. Staff regulations, which regulate the relationship between the institutions and their civil servants, are specifically left outside the scope of Article 298 TFEU. Moreover, the explanations adopted by the Intergovernmental Conference concerning the interpretation of the Article 41 CFR specifically mention the legal basis in Article 298 TFEU 'for the adoption of

legislation in the 'interest of an open, efficient and independent European administration', clearly establishing a link between the two provisions.

The entry into force of the Treaty of Lisbon has emphasized the citizens' perspective even more generally due to the Treaty of Lisbon introduction of a new Treaty Title on democratic principles governing all Union action. In particular Art 9 and 10 TEU underline the right of citizens to participate in the democratic life of the Union. Since these principles apply by definition to 'all areas of Union action' and are not limited e.g. to the Union's legislative work, they clearly set high requirements for Union administration as well.

Article 298 TFEU leaves national procedural autonomy relating to forms of action or procedural requirements untouched. The focus of the future Regulation will be on the EU institutions, bodies and agencies. Thus the matter would not be problematic from the point of view of subsidiarity: the quality and smooth running of administration in the EU institutions can be regulated only at EU level.

1.2 Current framework: fragmentation and lacunae

Today administrative procedures can be found in a wide variety of sources: the Treaties, for instance, already provide for a number of other provisions with a general administrative law character, and so does secondary legislation in some policy sectors such as competition and state aid. Some guidance has been developed through the case-law of the Court of Justice of the European Union. In addition, 'soft law' exists in the form of codes of good behaviour and ethical codes, most notably in the European Ombudsman's 'European Code of Good Administrative Behaviour' endorsed by the European Parliament, and the Commission's 'Code of Good Administrative Behaviour'.

The European Commission has argued that the EU already has sufficient provisions of administrative law in place. In an answer given to the European Parliament to a written question President Barroso stated that:

Article 298 of the TFEU provides the legal basis for a regulation that would cover all EU institutions, bodies and offices, if needed. Before having recourse to a new legal arrangement, the Commission would wish to examine the existing instruments and case law at EU-level and practices in the Member States to see if any further steps are needed. The Commission does not have a specific timetable for making a proposal. It considers that Article 298 provides a possibility, not an obligation. The

Commission recalls that the EU institutions are bound by Article 41 of the European Charter of Fundamental Rights.¹

More recently, Commissioner Maroš Šefčovič, Vice-President of the Commission, responsible for Inter-institutional relations and Administration and, confirmed this approach in an exchange of views with the Legal Affairs Committee².

Nonetheless, the current situation remains unsatisfactory. The major defect in current regulation is precisely that it is very fragmented and mostly sector specific. Very few EU regulations embed principles, rights and rules of administrative procedure that apply across the board to all EU policy sectors and to all EU institutions, bodies, offices and agencies. Subject specific or sector specific provisions and practices on administrative procedure differ from one case to another. Not all differences are the indispensable consequence of objective differences from sector to sector. In some sectors there is clearly a lack of regulations and established practices guaranteeing the rights of citizens, economic actors and other legal persons.

1.3 The need for a Regulation on good administration

All core elements of fundamental rights need to be laid down by law and be subject to efficient remedies to avoid protection gaps. The existence of such rules is often a precondition for the European Court of Justice to apply them in practice.

In various other areas the Charter provisions falling under Union competence have been put into effect through detailed regulation. This is the case, for example, with Article 42 CFR on the right of access to documents, where detailed provisions on the exercise of the right and the applicable procedure are given through Regulation No 1049/2001; and with Article 8 CFR on the protection of personal data, where applicable provisions have been put in place through Regulation No 45/2001 and directive 95/46/EC. The same should go for the 'right to good administration'.

The current state of regulation of administrative procedure raises fundamental questions regarding the relationship between the citizens and the EU administration, and the new openings provided by the Treaties confirm the necessity and offer the basis for the adoption of secondary legislation. A

¹ Parliamentary questions by Ms Anneli Jäätteenmäki, 17 January 2012, E-011125/2011.

² Legal Affairs Committee, 30 May 2012, available at: <http://www.europarl.europa.eu/ep-live/en/committees/search?committee=JURI>

Regulation is needed to clarify and enforce the key principles and procedural requirements on the exercise of the right to good administration, as laid down in art 41 CFR.

The textboxes in the following sections provide examples of problems encountered by citizens and economic operators with regards to the right to good administration.

2. Characteristics of a new Regulation

2.1 Clearer principles of good administration

Article 41 of the Charter of Fundamental Rights lists the elements of the right to good administration in a very general way. A general Law of administrative procedure would clarify many elements of this right with regards to the general principles.

Impartiality and the principle of fairness are two central Charter-based requirements of good administration. So far, some, but not all, elements of these principles have been subject to jurisprudence. With respect to impartiality, the general principle of proper handling of matters and duty to examine them with care exists in case law, based on a principle of sound administration. It is however rather general and would benefit from more detailed regulation. As for fairness, it encompasses the principle of impartiality as well as a number of other elements such as the principle of **lawfulness, non-discrimination and equal treatment**, as well as the principle of **proportionality**. Both the principle of impartiality and other elements of the principle of fairness require detailed guidance by the legislature in the future Article 298 Regulation.

Failure of the Commission to act on asthma inhalers

The case concerns a German inventor, who created an asthma inhaler to improve the lives of millions of patients, saving billions of euros, but who was prevented from selling it because of a 13-year-long failure of the Commission to act.

The inhaler was put on the market in Germany after obtaining all the necessary certifications (including a CE mark) to be sold as a medical device without medication. But in 1997, the Bavarian government claimed the product could be unsafe and convinced another German state to issue a sales injunction against the company which began selling the inhalers. It also notified the European Commission about the injunction, as required under the applicable Council Directive 93/42/EEC on medical devices. However, instead of analysing whether the product was dangerous and proceeding with a safeguard procedure, the European Commission did not issue a ruling, meaning the company was never given a chance to appeal against any decision.

In 2005, the inhaler was sold under a new name and another sales injunction was issued, but this decision was not notified to the European Commission. The manufacturer turned to the Commission, with a view to initiating infringement proceedings against Germany. But again, the Commission did nothing, taking the view that there was no need for a product safety review.

The failure of the Commission to act had important consequences. The manufacturer was prevented to sell his product legally for more than 13 years, without any means of legal redress and has consequently suffered considerable loss of earnings. Moreover, the inhaler saves between 25 and 35 per cent of the costs for asthmatics. With around 34 million asthmatics in the EU, the insurance companies and the National Health Service could have saved €50 billion had the inhaler been used since 1997 for asthmatics alone.

The European Parliament took up this case and called on the Commission to respond to the manufacturer's legitimate concerns and to take necessary steps to enable him to assert his rights.

P7_TA(2011)0017, EP resolution on Petition 0473/2008 by Christoph Klein (German), concerning the failure of the Commission to take action regarding a competition case and the harmful impact of this on the company concerned, 19 January 2011.

Need to act within a reasonable time: - the Courts have had the opportunity to address this question repeatedly, since complying with this principle remains problematic for the EU administration. While there is some acknowledgment of this principle in case law, it has not been strong enough to fight unreasonable delays or do away with the practice of 'implied decisions'. Setting exact deadlines is currently left to secondary legislation, and the assessment of their reasonableness is left to the legislature in adopting them.

In addition to the above-mentioned core principles, Article 41(2)(a) CFR establishes a '**right of every person to be heard**, before any individual measure which would affect him or her adversely is taken'. In case law, the right to be heard is often being associated with the rights of the defence. It is well recognised, although limited, like the Charter provision itself, to cases in which the intended measure would have an adverse effect, it might however not always be clear whether the intended measure is positive or negative; and a measure might be positive for some while being negative for others. The new Regulation should therefore confirm the right to be heard clarifying that it applies to cases where an administrative decision would affect the rights of persons directly.

Unfair listing of a company in the Early Warning System

The case concerns a company involved in a number of projects financed by the Commission. In the framework of a commercial dispute, one of its subcontractors obtained from a court in Luxembourg a claim for debt reimbursement for an amount of

EUR50 000. When the Commission was informed of this order, without any prior hearing of the complainant, it took the decision to retain the sum of EUR 50 000 from the amounts due to the complainant.

Furthermore, again without informing the complainant- who learnt about it later, informally, from some Commission staffers- the Commission listed the company in its so-called "Early Warning System" ("EWS"). The EWS alerts the Commission to cases where a beneficiary may have committed (serious) administrative errors or even fraud. The listing of a company in the EWS is communicated to all Commission services.

As a result of this, and even though the Commission had already decided to retain the EUR 50 000 sum, the blocking of the complainant's payments was almost a permanent situation. The company exchanged several letters with the Commission concerning the matter, but remained listed in the EWS until almost a year later. The company suffered serious loss as regards new contracts, major delays in payments, administrative overheads and irreparable damage to its reputation.

As the Ombudsman rightly pointed, this case illustrates the importance of striking a fair balance between the protection of the Communities' financial interests and the respect for the rights of the defence of the parties involved. While the Commission acted in conformity with the law with regards to the retention of the 50 000 EUR sum, the company's continued listing in the EWS was unfair and constituted an instance of maladministration.

Complaint 2468/2004/OV (Confidential) against the European Commission

The **right to access one's own file**: the Court has been generally reluctant to use the rules on public access to compensate defects in other access regimes. The Court has pointed out that the matter of access for interested parties to a file ought to be settled elsewhere than under the public access rules. A general law on administrative procedure should include provisions on the central principles and applicable minimum standards of this right.

The **duty to reason a decision** is in general well-acknowledged in principle, even if a breach of this duty is often in practice claimed before the Courts. For the individual it is the only guarantee that all the relevant facts and rules have been taken into account when his or her case has been examined and the decision taken. Proper reasoning also has a clear linkage with the trust of individuals in the administration acting correctly in general terms, and as such, reduces the need of unnecessary litigation. Reasoning is a key element of good administration and the new Regulation should include detailed provisions in this respect.

As for the right to **have the Union make good any damage**, Art. 340 TFEU establishes the principle of non-contractual liability, stating that 'the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the

performance of their duties’. While the matter is included in Article 41(3) CFR, it is in practice regulated elsewhere, and there is also an extensive amount of case law on this question. Thus it would not necessarily seem to be an issue for the future Article 298 Regulation.

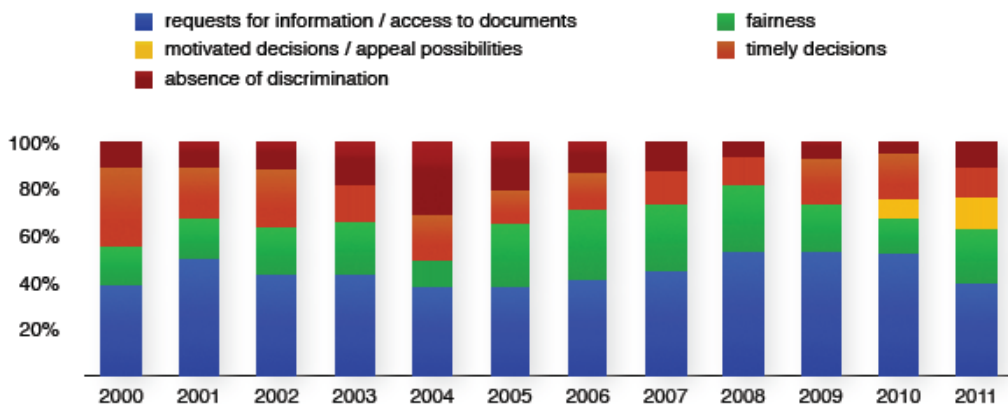
The same is true for the **right to communicate with the institutions in any of the Treaty languages**, as provided for in Article 41(4) CFR. Under Article 20(2)(d) TEU, EU citizens have the right ‘to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language’. A similar provision exists in the 2001 Code, where it is extended to ‘every person’. The possibility of citizens to communicate with the institutions in their own language is of a particular practical and symbolic importance. It would however be impossible to provide every single document in all official languages. While the linguistic arrangements of the institutions would not primarily be a matter for the Article 298 Regulation, the legislation should secure the possibility for the administration to function efficiently and simultaneously allocating the resources necessary to comply with requirements. It should not be up to individual officials to decide on a case by case basis what language they use in relations with the public.

2.2 Better defined standards

In addition to clarifying the general principles, the new Regulation on a Law of administrative procedure should codify a number of basic procedural rules and standards to be followed by the Union's administration when handling individual cases.

The chart below illustrates Ombudsman's statistics on alleged maladministration.

Ombudsman statistics on alleged maladministration (number of cases in selected areas of administrative law)³³



European Ombudsman, Annual Reports for 2010, 2011.

Analysis of the complaints to the Ombudsman shows a number of areas where there is room for improvement with regards to the establishment of precise procedural standards. For example, indicating a time limit for handling a matter, and following it in practice, is a general problem: delays in taking a decision and delays in replying occur frequently, as do late registration and late answers to requests. From the point of view of citizens, waiting for a decision, and perhaps not even knowing when it is to be taken, is a serious problem, and not only when there is money involved.

A considerable part of alleged maladministration, however, concerns sectors that would benefit from the establishment of clearer, binding rules in the new Article 298 Regulation.

Infringement proceedings (Article 258 TFEU) constitute one such area. Procedural guarantees are lacking and these proceedings tend to give rise to many complaints. The main shortcomings reported by the Ombudsman refer to a failure to register complaints. Other problems include alleged failures to hear the complainant before rejecting a complaint, with respecting the rights of defence, and extensive delays in communicating with complainants. In April 2012 the Commission issued a new Communication³ in an attempt to reply to criticisms by the European Ombudsman as well as those raised in the discussions of the JURI Committee. The communication addresses many of the issues raised by the European Ombudsman in previous years, but maintains the same legal format with limited capacity to bring about clear qualitative changes. While granting a formal status to the complainants in the Article 258 TFEU infringement procedure falls outside the scope and objectives of the Article 298 TFEU exercise on good administration, the latter provision being applicable across the board, would establish certain procedural safeguards, such as the registration of complaints, time-limits, the right to be heard, the obligation to state reasons and a duty to inform complainants at certain stages of the proceedings.

Award of tenders and grants is another significant area⁴, in which citizens have direct contacts with the Commission and some agencies. With respect to grants, concerns exist relating to the eligibility of costs and the handling of research proposals, excessive bureaucracy and obligations disproportionate for beneficiaries. Many complaints in the area also relate to the principle of fairness

³ Communication from the Commission to the Council and the European Parliament. Updating the handling of relations with the complainant in respect of the application of Union law. Brussels, 2.4.2012 COM(2012) 154 final.

⁴ From a financial point of view, in total, in 2007-2013 EU financial programmes amount to €975 billion. See e.g. New funds, better rules. Overview of new financial rules and funding opportunities 2007-2013. Luxembourg, Office for Official Publications of the European Communities, 2008

when recovering grants or requesting reimbursement. Those affected are individual researchers, research communities, societies and NGOs, many of them with limited means and high dependency on the funding. In their situation, questions affecting the eligibility of costs and fairness in implementation are extremely significant. Excessive bureaucratic features hamper the attractiveness of Union funding, which it turn negatively affects the quality of projects funded with EU means.

Many complaints also concern obvious errors, inconsistent, inaccurate or misleading information given by the Institutions. The new rules should therefore make provisions for review and correction by institutions of their own decisions, both on grounds or clerical errors but also on other grounds in certain specified cases.

**Reasonable time-limit for taking decisions,
correction by Institutions of their own decisions**

As a result of the eruption of a volcano on Iceland in April 2010, a considerable number of flights had to be cancelled. On 4 May 2010, the European Commission published on its website a number of documents to inform air passengers of their rights.

On 5 May 2010, an association of European airlines, drew the Commission's attention to what it considered to be inaccurate and misleading information contained in that document. This e-mail was marked as urgent. In its reply of 12 May 2010, the Commission took the view that the information it had published was correct. On 13 May 2010, the complainant renewed its criticism. On 18 May 2010, the Commission reached the conclusion that part of the relevant document was indeed potentially misleading and that it should therefore be revised. But the relevant document was only removed from the website on 11 June 2010, ie almost a month later.

This case illustrates how important it is for good administrative practice for EU institutions to ensure that the information provided to the public is accurate and not misleading, and to correct promptly any errors that such information may contain.

Complaint 1301/2010/GG against the European Commission

The keeping of adequate records is also an essential aspect of good administration and a necessary precondition for transparency.

A new Regulation on administrative procedure is thus required to clarify the main principles and standards, to ensure that citizens can properly enforce their right to good administration.

2.3 A single, binding general law establishing minimum requirements

It is clear from the above that the new Regulation would respect the fundamental principles of good administration and further develop them by including standards relating to the handling of a specific matter, such as provisions on the initiation of an administrative procedure, acknowledgement of receipt, duty to act within reasonable time, duty to state reasons, as well as provisions on the review and correction of own decisions. Such provisions would be extremely useful as they are the ones that are currently the most lacking or where the greatest divergences lay. These are also the matters that are present both in the complaints to the Ombudsman and in the Court's jurisprudence, where the Court has clearly required the legislature to lay down the relevant standards. None of these principles are complete novelties, and in fact, the European Code of Good Administrative Behaviour could serve as a good basis for their codification, so as to guarantee their full implementation.

This set of general principles and standards should act as a minimum safety net of guarantees to citizens – both private individuals and legal persons - in their interaction with the EU's administration - institutions, agencies, bodies and offices.

Dealing with requests for information and access to documents, duty to reason a decision

The case concerns access to documents relating to CO₂ emissions from cars. In 2006, the Commission held consultations with key stakeholders concerning a proposal to reduce CO₂ emissions from passenger cars. In this context, former Commission Vice-President Verheugen received several letters from car manufacturers, including three from Porsche AG. In March 2007, the environmental NGO Friends of the Earth Europe requested access to these letters. The Commission originally refused access, arguing that disclosure of the letters would undermine the protection of the company's commercial interests.

Following an inspection of the documents, the Ombudsman recommended giving access to the letters. The Commission asked for six extensions to the three-month deadline before finally accepting, in part, the recommendation: it accepted granting partial access to the three Porsche AG letters to former Vice-President Verheugen. The Commission still did not provide convincing additional explanations to justify its decision to provide only partial disclosure of the documents concerned.

The Ombudsman considered that the Commission's delay in replying constituted an infringement of its duty under the Treaty to cooperate with him sincerely and in good faith and the insufficient justification of its decision to deny full access to documents was an instance of maladministration.

In its Resolution of 25 November 2010, the European Parliament endorsed the Ombudsman's critical remarks and considered that the Commission's uncooperative attitude in this and other similar cases risks eroding citizen's trust in the Commission.

This case illustrates the importance on clear and precise standards on the duty to reason a decision for the correct and full exercise by citizen's of their right to access to documents.

Complaint 676/2008/RT against the European Commission

The law should be limited to direct EU administration and be applicable, as *lex generalis*, to all areas of Union activity. Such codification would be necessary in particular when operating in a field where private individuals and companies do not currently enjoy strong procedural rights, for example in the different competition law procedures and the infringement proceedings.

Creating horizontally applicable minimum standards would not require a completely uniform administrative procedure to be applied across all EU policies, but would guarantee that the core rights and relevant procedural steps are appropriately taken into account in all areas of Union action. Special legislation (*lex specialis*), applicable in a particular policy sector, could still be used when necessary to offer more detailed guidance while still guaranteeing the minimum level provided by the Article 298 Regulation. The Article 298 Regulation would always apply, unless another piece of legislation provides otherwise.

3. Added value of the new Regulation

3.1 Clearer rights and more legal certainty

The over-complex administrative procedures and gaps in the protection of citizens' right to good administration cannot be resolved by recourse to the Court of Justice. The relevant case-law is of limited use, as the Court has been reluctant to give the right to good administration a very detailed meaning and **required the legislator to adopt clear standards**⁵.

To meet the wish of the Court of Justice the EU needs a single binding document going beyond the minimum common denominator set out by Art. 41 CFR and the general principles laid down in case-law, and which would codify existing administrative practices.

The Regulation would also safeguard the proper role of the Court of Justice in relation to administrative decisions. It is not the task of a court to take administrative decisions on behalf of the administration itself. Instead, courts should review if the law and the correct procedures have been followed, and that the administration has used its discretion within the margins allocated in legislation and for the right purpose. If this is not the case, then the matter is to be returned to the administrative body for a revised decision. For the Court to be able to do this, a proper codification of administrative procedures must be in place.

The current situation is that the most precise and comprehensive codification can be found in the internal documents of the institutions, in particular their Rules of Procedure, and in soft law documents, such as codes of conduct. These cannot however properly safeguard citizens' rights. Only binding, mandatory instruments have the capacity to establish enforceable rights for citizens, ie rights which may be the basis for a claim and, if non-compliance with the rules is proven, which may be the source of sanctions.

A binding regulation is thus crucial for the proper enforcement of the right to good administration, as soft law always leaves the Court in a position to decide what emphasis it might grant to the norm in a particular situation.

⁵ C-255/90 P *Jean-Louis Burban v the European parliament*, para 20. See also Case T-15/91 *Josée Bollendorff v European Parliament*.

In fact, the European Parliament called on the European Commission already in September 2001 when adopting the Ombudsman's Code through a resolution, to submit a proposal for a regulation containing the detailed provisions of the Code.

3.2 Citizens and EU administration

For 33% of European citizens, the right to good administration by the EU institutions, is the most important citizens' right, according to a Special Eurobarometer⁶. The same survey further evidences the citizens' dissatisfaction with the lack of transparency of the EU institutions. Citizens would like to be more involved in EU activities but there is still a huge gap between them and the Institutions, despite a certain progress in increasing transparency and openness.

Questions relating to good administration are often a source of litigation, partly because it is unclear when and what administrative standards apply. Uncertainties exist both for individuals and for officials as regards, for example, the procedural steps to be taken. Decisions that are not deemed fair and just, cause dissatisfaction and, ultimately, litigation. A Regulation on the law of administrative procedure containing clearer rights and enhancing legal certainty, would increase the transparency of the administration and its "accessibility" for the citizens, and as such, contribute to reducing the gap between the citizens and the administration.

Today, the parallel existence of different rules and codes of conduct for the various EU institutions and bodies can give rise to confusion and disorientation that is due to be felt by citizens who have to deal with different institutions and bodies, due to their own different activities. Including clear principles and standards in a written body which would be applicable across the board, would in itself constitute a step forward in terms of transparency: knowledge of the current law by authorities and citizens would be enhanced, which would in turn favour its acceptance and observance by both.

Moreover, the new clear wording of the Regulation will offer series of advantages: it will be well structured, precise and written in a user-friendly language; it will be published in all language versions, with the benefit of the involvement of lawyer-linguists; the involvement of MEPs in the ordinary legislative procedure will offer a unique opportunity to check its closeness to citizens and its user-friendly character.

⁶ July 2011

A general law of administrative procedure would also have positive effects on the prevailing institutional culture, contributing in consequence to improving relations between the EU citizens and Institutions.

Dismissive reply to an ordinary citizen in a request for information

A Polish citizen, became aware that, while on holiday, the President of the European Council had used service cars, together with his family. He asked the European Council to reply to a number of questions and for a copy of the relevant rules on the use of service cars for personal purposes. The European Council's replies were dismissive and the complainant's queries - ignored. Only after intervention of the European Ombudsman, more precise answers were provided: a copy of the European Council's reply to parliamentary questions which were similar to the complainant's query, was sent to the complainant. In this reply, the relevant rules were put forward.

As the Ombudsman rightly pointed, it is puzzling why the European Council did not give the complainant the same or a similar reply as that which it had given to the relevant MEP. This example illustrates how courtesy and service-mindedness on the part of EU Institutions and their staff are crucial in building up and maintaining trust between citizens and European public administration. Including these requirements in a binding general law of administrative procedure would help achieve this overarching goal.

Complaint 808/2011/MHZ against the European Council

The point of good administration is to ensure that citizens are confident that their matters are handled properly. In this respect, the idea of service-mindedness, a principle that in national systems is often expressed as citizen-friendliness or as a concept of public service, could be elaborated and gain a fundamental position in the context of the new Regulation. The service principle is acknowledged for ex. in Finland, Sweden or Spain. This principle, which includes such elements as legitimate expectations, consistency and advice, courtesy, and an obligation to transfer to the competent service, is already present in some soft law instruments, like the 2001 Code of Conduct on good administrative behaviour. This concept aims in fact at establishing a wider framework for guaranteeing both appropriate service and high performance of the administration's tasks.

Legitimate expectations, consistency and advice

A French non-profit scientific organisation, successfully carried out three TACIS projects in the former Soviet Union. However, an external audit revealed subsequently that the arrangement made between the complainant and a company in Moscow concerning the payment of staff was against the applicable rules. The Commission immediately issued a

claim for reimbursement. The complainant acknowledged its mistake. He explained it was the result of its limited understanding of legal matters, but argued that it had always kept the Commission's project officer informed of its practices.

The case was concluded with a finding of maladministration on the part of the Commission. As the Ombudsman pointed, when faced with project officers' silence vis-à-vis their actions concerning the projects they execute, economic operators may reasonably be led to believe that they are acting in accordance with the applicable rules. When this is not the case, and once project officers are made aware of such actions, they should take preventive action and when they fail to do so, it should be possible to subject them to disciplinary measures.

This case shows the importance of clear provision on legitimate expectations, consistency and advice the exercise of the right to good administration.

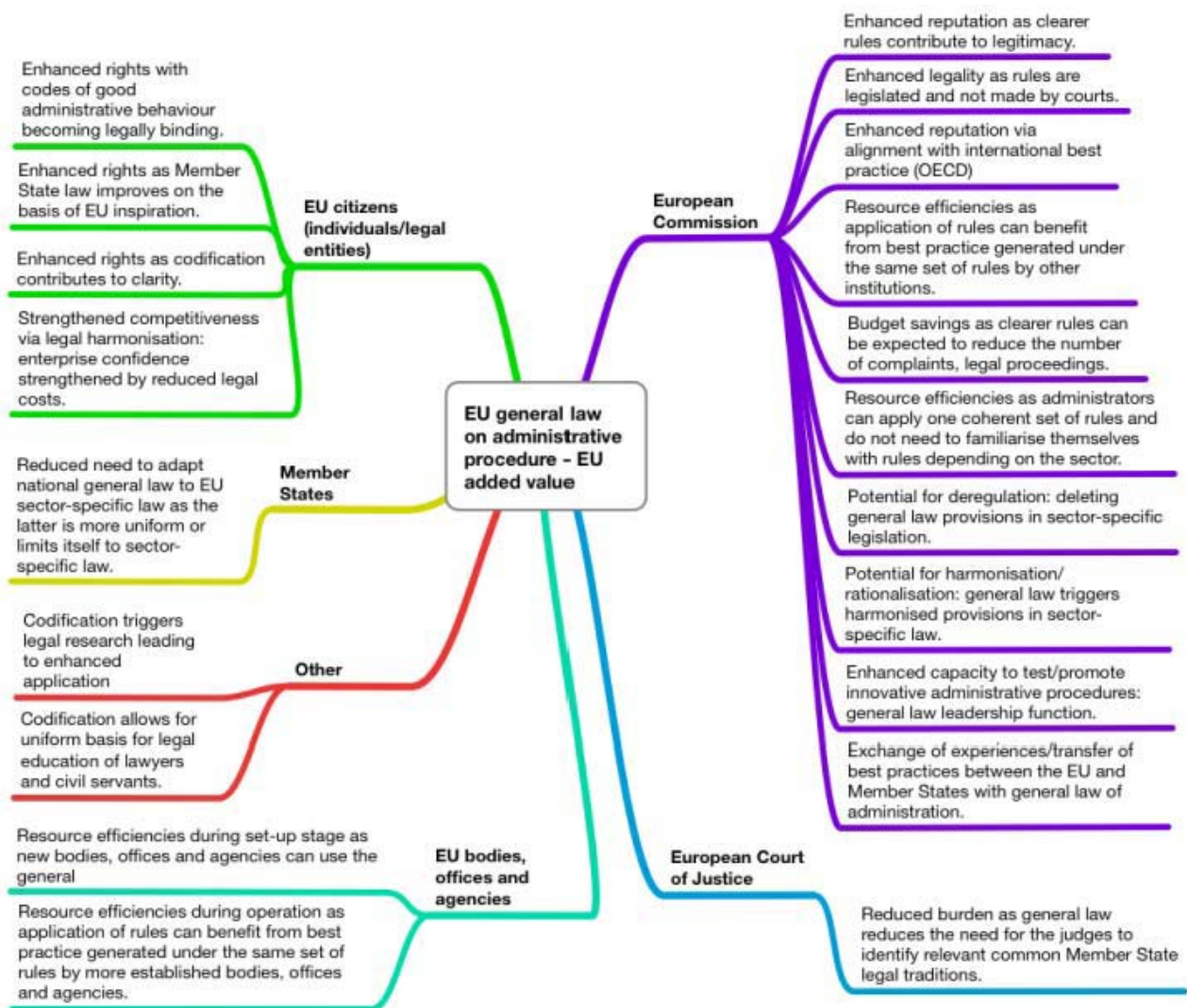
Complaint 3373/2008/(BB)(BU)JF against the European Commission

The binding character of law would underline the importance of the embedded principles and give a higher profile to an instrument of this kind in the minds of officials, changing the institutional culture. The choice of 'soft law' gives discretion to the institution implementing it, since in practice, the Institution will always have the final choice of either implementing the soft law norm or disregarding it. The binding character of a regulation is a factor not to be underestimated with a view to and the relation between citizens and the EU administration.

The experiences drawn from Regulation No 1049/2001 could be used as an illustration of how the adoption of legally binding rules is indeed an effective way of influencing the everyday institutional practices: compared to the period before its adoption, a greater number of documents are now being released by the institutions, either automatically or following requests by citizens. This demonstrates that limiting the institution's discretion automatically subjects the implementation of rules and principles to external control – something that has so far been largely lacking with the exception of the soft law methods of control exercised by the European Ombudsman, which only have a limited impact on institutional attitudes.

3.3 A more efficient EU administration

As provided for in Article 298, the "efficiency" of European administration is one of the core elements to be safeguarded in any new regulation.



The Commission considers that a binding EU Law on Administrative Procedure might be largely detrimental for the administration, as it would bring excessive rigidity and slow down decision-making.

On the contrary, if well-worded, a law of administrative procedure contributes to enhancing the efficiency of administrative systems - i.e. providing better service, possibly at a lower cost - through more effective and transparent procedures as well as cost savings.

The chart above illustrates the sources of efficiency gains.

National experiences

Today, twenty out of 27 Member States have so far enacted a general law of administrative procedure. Experience in State public administration demonstrates overall that it is not the binding character as such of a law of

administrative procedure that generates negative consequences, but instead the wording of its relevant provisions, and the general attitude of officials and the public with regard to its implementation. Where provisions on administrative procedure are well worded, and the appropriate organisational and training efforts are undertaken, experience has shown that a law on administrative procedure not only has positive consequences on the rights of citizens, economic operators and other legal persons, but also contributes to more efficient and effective public management. This was one of the grounds for reforms in public management introduced under the motto 'diminish red tape', or 'reduce bureaucracy' and has led, in some Member States, such as Germany or Italy, to reform the law of administrative procedure, in order to accelerate decision-making. It must also be stressed that the most recent trends in public management reform – in a number of Member States, but also in the relevant sections of the OECD – have moved towards consolidating the rule of law and citizen's rights.

Binding regulation and efficiency are therefore not mutually exclusive: it is feasible to make laws that increase the efficiency of administration by enabling different means of steering administrative action. Good administration should not be understood as an additional requirement, but as a natural way of working. When problems in the administration persist, its efficiency suffers. To take an example, in a case of an infringement procedure, the adoption of binding rights in a horizontal instrument would not need to limit the Commission discretion, but would instead focus on procedural matters such as time-limits and the duty to give reasons.

Resource efficiencies and costs savings

Expected efficiency gains deriving from the adoption of a general law on administrative procedure are multiple. Proper standards of administration save time, costs and burdens. They make application of administrative law easier and diminish the need to examine complaints afterwards.

First, a general law on administrative procedure can be expected to **reduce the volume of litigation** in the European Court of Justice, and thus reduce the need for the EU administration to dedicate time and resources to prepare and for and follow-up on litigation. Beyond this, lawyers and judges would benefit from a general law of administrative procedure as they would no longer need to familiarise themselves with the different general provisions on administrative procedure included in the wide range of sector specific legislation. A general law of administrative procedure would therefore bring savings, by reducing legal costs for citizens, economic operators and Institutions.

A general law on administrative procedure can also contribute to savings by **reducing the volume of legislation**, for example by allowing deleting general administrative law provisions in sector-specific laws. In a number of Member States, the growing number of regulatory 'authors' and the increasing volume and complexity of administrative law was one of the motivations behind the codification of general law on administrative procedure. Experience in the Netherlands, Finland or Germany for instance demonstrates the success of the general law of administrative procedure in terms of ensuring uniformity and clarity in new legislation. On one hand, a general law compels the legislator at least to justify any deviance from the procedural model, on the other hand it simply reduces the need for sector-specific legislation to deal with general procedural issues.

A general administrative law brings **resource efficiencies and productivity gains**, as it frees administrators and legal services from the requirement to elaborate and apply separate general provisions on administrative law for every EU institution, body, office or agency (thus allowing these actors to concentrate on their 'core business'). The potential for resource efficiencies is substantial, considering the growing number of different EU bodies, offices and agencies. Resource efficiencies can be expected at the set-up stage (e.g. when a new Agency is established) as new bodies, offices and agencies can use the general law of administration as a basis and do not need to 'start from scratch' when preparing administrative procedures concerning their organisation's interaction with the public. This is important, as, at present for example, all agencies have established somewhat different procedures governing access to documents. Moreover, there are resource efficiencies during operation as application of procedures can benefit from best practice generated under the same set of rules by other Institutions. This in turn encourages the development of mutual trust between the various administrations and the improvement of their relations.

Another clear benefit will be the **smoother mobility of staff** between different offices and authorities, as officials would not need to relearn operating routines almost from scratch, as happens when each office or authority has its own rules on administrative procedure.

A general law on administrative procedure has the potential to strengthen **the coordinating function** of the relevant actors, thus contributing to harmonisation and helping to promote innovations. General law on administrative procedure has a 'guidance' and 'leadership' function, i.e. innovations are first 'tested' at the level of the general law on administrative procedure, and then further elaborated/articulated in sector-specific law. Neglecting this function leads to inconsistencies between different areas of sector-specific legislation. A general

law on administrative procedure covering the EU administration would help the European Commission to ensure more effective and innovative steering of EU policy and activity (e.g. eGovernment).

This in turn could bring particularly important savings in the field of **IT systems and eGovernment services**. Electronic communication between the EC and the EU citizens and businesses is only covered by sector-specific legislation and suffers from a lack of leadership and internal communication. This leads to a redundancy of IT systems and functionalities and thus resource inefficiencies, and has already been strongly pointed in the press: *'It [the EC] employs 3,800 staff and spends €500m a year on systems so disparate that it is incapable of finding common cause between them'*.⁷ Regarding, the area of 'external communication', the European Commission itself notes that the potential gains stemming from the rationalisation of the fragmented IT systems of communication with the general public are significant and would amount to savings of more than 2M€ in the next 4 years⁸.

Significant benefits for the society and the economy are also expected from the rationalisation and development of eGovernment at EU level. eGovernment has considerable impact in financial terms (e.g. tens of billions of euros potential savings for taxpayers) as well as in non-financial terms (e.g. higher public service quality, more transparency, increased user satisfaction, inclusion and involvement), as demonstrated by national experiences. In the Netherlands, for example, the total administrative cost is estimated at EUR16 billion per year, including 4 billion administrative costs for tax-related obligations (in 2002). The bureaucracy costs for SMEs significantly reduce their profits. Thanks to eGovernment, companies can save €10 per VAT declaration by making these online, which translates into a potential of hundreds of millions of euros savings across Europe. In Germany, the investments in eGovernment are soon to be amortised given that the investment costs of EUR 1.65 billion can be set against annual savings of EUR 400 million. For example, an official notice costs EUR 7.50 to process by conventional means, whereas it costs only EUR 0.17 when done electronically. At EU level, public services concern 470 million citizens, 20 million private businesses and several 10,000s administrations in Europe. Governments in the EU25 spent on average 45% of GDP in 2004 and procured about 16%. The potential contribution that a general law on administrative procedure would

⁷ ComputerWeekly.com, European Commission prepares for cuts to sprawling €500m IT spend.24.03.11. <http://www.computerweekly.com/news/1280095517/European-Commission-prepares-for-cuts-to-sprawling-500m-IT-spend>, 2011, accessed on 18 September 12

⁸ EC, Communication to the Commission, Follow up to the Communication 'Getting the best from IT in the Commission' of 7 October 2010 - First decisions in the IT rationalisation process. 30 November 2011. page 4

have in terms of rationalisation and steering is therefore not to be underestimated.

Additionally, a law of administrative procedure can contribute to improving the **competitiveness of the EU** on the international scene. In the current globalised economy, legal clarity and certainty in the legal system (and in particular in the regulations governing the functioning of administrations) constitute an important factor in competitiveness. Clear and easily accessible rules would, as the German experience confirms, lead to a reduction of costs for business for obtaining information on current law, discourage the flight of capital from the EU and encourage foreign direct investment.

Finally, the experiences from national contexts also demonstrate that the introduction of more detailed provisions of good administration need not entail additional **costs** for the administration or require additional resources. In fact, reform saves money, as can be seen from the analysis of the Swedish experience. The main cost component of the new Regulation would be educating the staff in EU institutions to comply with its requirements.

3.4 Reinforcing the legitimacy of the Union

Open administration promotes good governance and the participation of citizens in the Institutions' activities. An open administration is an efficient administration. Clear, transparent rules placing the citizen and the idea of public service at the center of the institutions' preoccupations improve the quality of the administration and constitute a key element in ensuring citizens' trust in EU Institutions and improving their legitimacy.

As the Legal Affairs Working Group underlined in its report "*citizens should not be viewed as mere receivers of administrative decisions but rather should be called upon to actively participate in the exercise of power*".

Recommendation

A Regulation based on Art. 298 TFEU would have obvious practical effects: it would result in clearer standards and more open, better quality administration that delivers results more efficiently and at a lesser cost. This would have equally clear benefits for the citizens and the administration.

Enforcing Citizens' Right to Good Administration: Time for Action

**Research paper
by Dr Päivi Leino-Sandberg**

Abstract

The Charter of Fundamental Rights and Article 298 TFEU establish a right of citizens to good administration, but the detailed provisions needed to enforce this right are lacking. For individuals and companies dealing with EU administration – mainly the Commission and agencies – ambiguous standards cause problems, which may ultimately hamper the achievement of EU objectives. A new Regulation on good administration would be an efficient means to influence institutional attitudes: the administration exists for the citizen and not vice versa. National experiences suggest citizen-friendly administration saves money. Both the citizens and the institutions benefit from clear standards and procedural requirements: a proper Regulation on good administration is a win-win alternative.

AUTHOR

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List of abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights
CJEU	European Court of Justice
EU	European Union
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
NGO	Non-governmental organization
OHIM	Office for Harmonisation in the Internal Market
OLAF	European Anti-Fraud Office
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Towards a right to good administration

Key findings

- It is clear that after the entry into force of the Treaty of Lisbon good administration is a fundamental right of citizens.
- All core elements relating to the exercise of fundamental rights need to be laid down by law and be subject to efficient remedies. This is currently not the case with the right to good administration.
- In light of the general provisions of the Charter, there is a need to adopt a piece of secondary legislation based on Article 298 TFEU on the exercise of the right to good administration. This new legal basis has not yet been put into practice.
- The Court of Justice has been reluctant to give the right to good administration a very detailed meaning and required the legislature to adopt clear standards.
- The new legal basis in Article 298 TFEU focuses on the EU institutions, and there would seem to be neither competence nor need to harmonise Member States' national legislation. As regards the principle of subsidiarity, it is clear that administration by Union institutions can only be regulated at Union level.

Good administration, despite its importance, has remained largely undefined in the EU. While the EU administration today exercises various functions in direct contact with EU citizens, there is no proper regulation of such interaction. When compared to a national administrative setting, it is noteworthy that, while some sectors of the EU institutional administration have been required to uphold extensive administrative procedure rights on the basis of secondary legislation, there is no general application of such principles or practices to the EU administration as a whole.¹ In the Member States, administration is regulated in a much more detailed manner, for example as regards procedural questions, the organisation of administration, cooperation between different administrative branches, time limits, language arrangements, administrative supervision and controls, administrative sanctions, access to documents (privileged and public access), data protection, and questions of responsibility and available remedies.

It is only after 1995 that a definition of the opposite of good administration, 'maladministration' - bad administration- was attempted by the first European Ombudsman, Jacob Söderman, who in his 1995 Annual Report defined

¹ Melanie Smith, 'Developing administrative principles in the EU: a foundational model of legitimacy?' 18(2) *European Law Journal* (2012) 269-288.

maladministration as ‘failures to act in accordance with EC law’; a definition that relies on the elements of good administration being, in fact, laid down by law.²

The idea of good administration as a right of citizens was introduced at the EU level in the context of writing the EU Charter of Fundamental Rights, largely by the same Jacob Söderman. In a public hearing on the draft Charter he argued that a right to good administration should be included, based on

*‘the idea that the citizen has a right that his or her affairs be dealt with properly, fairly and promptly by an open, accountable and service-minded public administration.’*³

Many of these elements were included in Article 41 CFR on the Right to good administration, which, according to Article 6(1) TEU after the entry into force of the Treaty of Lisbon, has ‘the same legal value as the Treaties’. The Treaty of Lisbon also makes another significant opening in providing a legal basis (Article 298 TFEU) for secondary legislation – one or several regulations – on good administration. However, almost three years after the entry into force of the new Treaty, there is still no single piece of secondary legislation – or even a proposal for a Regulation – that would regulate EU administration comprehensively and horizontally. Some core elements of good administration are, in fact, merely regulated through soft law or unilateral commitments given by the institutions. This is clearly unsatisfactory; all core elements relating to the exercise of fundamental rights would need to be laid down by law. The entry into force of the Treaty of Lisbon has emphasized the citizen perspective even more generally due to the Treaty of Lisbon introduction of a new Treaty Title on democratic principles governing all Union action. These provisions underline the right of citizens to participate in the democratic life of the Union.⁴ Since these principles apply by definition to ‘all areas of Union action’ and are not limited e.g. to the Union’s legislative work, they clearly set high requirements for Union administration as well.

From the point of view of citizens, the principle of good and sound administration in EU law, even if recognised in primary law and the Court’s jurisprudence, would benefit from greater clarification and level of detail through provisions in secondary legislation. As will be demonstrated in Section 3, the existence of such rules has usually been a precondition for the Court to in apply them in practice. It would seem necessary to specify in greater detail, for example, when a right to be heard applies, or when access to one’s own file is to be granted. In various other areas the Charter provisions falling under

² Annual Report of the European Ombudsman 1995, 17; Annual Report of the European Ombudsman 1997, 22. However, even other things could constitute maladministration, such as administrative irregularities and omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and lack or refusal of information.

³ Speech of Jakob Söderman, the European Ombudsman at the Public Hearing on the draft Charter of Fundamental Rights of the European Union, Preliminary remarks, Brussels, Belgium, 02 February 2000, available at <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark> .

⁴ Article 9 and 10 TEU.

Union competence have been put into effect through detailed regulation; this is the case, for example, with Article 42 CFR on the right of access to documents, where detailed provisions on the exercise of the right and the applicable procedure are given through Regulation No 1049/2001; and with Article 8 CFR on the protection of personal data, where applicable provisions have been put in place through Regulation No 45/2001 and directive 95/46/EC.

The adoption of secondary legislation is of a particular importance because the rights enumerated in the Charter do not modify powers and tasks as defined in the Treaties.⁵ Instead, they are exercised under the conditions and within the limits defined by the Treaties and relevant secondary legislation and executive acts, and are to be 'judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. Therefore, in order to reach beyond the widely formulated provisions in the Treaties, there is a direct legal need to adopt a piece of secondary legislation based on Article 298 TFEU on the exercise of the right to good administration.

Article 298 TFEU leaves national procedural autonomy relating to forms of action or procedural requirements untouched.⁶ The idea behind the new legal basis is not to replace national regulation but to fill a currently existing lacuna in regulation. The focus of the future Regulation would be on the EU institutions, bodies and agencies. Thus the matter would not be problematic from the point of view of subsidiarity: The quality and smooth running of administration in the EU institutions can certainly only be regulated at EU level. Regulating national administrations would not seem desirable, or even legally possible: administrative cooperation is a matter where the Union only has competence to carry out actions to support, coordinate or supplement actions of the Member States (Article 6 TFEU).

This paper will argue that the adoption of comprehensive rules on good administration is necessary and urgent. After a description of the applicable legal framework (Section 2), this paper will discuss the Charter provision on good administration in a greater detail, since it currently provides the most elaborate description of the principle, and compare its wording with the requirements of the Court jurisprudence, which to a large extent predates the legal force of the Charter (Section 3). Then attention will be given to the prevailing institutional culture in implementing the right to good administration and the problems demonstrated by case law and the Ombudsman practice in order to evaluate the effects that a Regulation on Article 298 TFEU could be expected to have (Section 4). Finally, the paper will close around the themes of open administration, bureaucracy, legitimacy and enhanced citizen involvement.

⁵ See the general provisions of the Charter, Article 51 and 52.

⁶ On this, see also Jürgen Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon', 18(2) *European Public Law* (2012) 285-304. Unlike Schwarze suggests, the reason for this is not, however, Article 291 TFEU, which regulates an entirely different question.

2. Applicable legal framework

Key findings

- The Charter and the Treaties include various key provisions on good administration. In addition, a fair bulk of secondary legislation exists.
- Current regulation is fragmented, uneven and far from comprehensive. Many questions are not addressed at all, or only at such a general level that the provisions are of a limited use for citizens.
- Article 298 TFEU provides a suitable legal basis for the adoption of comprehensive rules on good administration.

What kind of requirements are currently set for the quality of Union administration based on Union primary law? According to Article 41 CFR:

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
2. *This right includes:*
 - (a) *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - (b) *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - (c) *the obligation of the administration to give reasons for its decisions.*
3. *Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
4. *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*

The wording of Article 41 CFR is based on case law and provisions in the Treaties.⁷ In fact, the Charter together with the EU's general principles of law offer a solid – even if not sufficiently comprehensive and detailed – starting point for administrative law. After the entry into force of the Treaty of Lisbon, the clear starting point for any study on EU administrative law is the new Article 298 TFEU:

1. *In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.*
2. *In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.*

⁷ Explanations relating to the Charter of Fundamental Rights, OJ 2007/C 303/02.

The wording of Article 298 TFEU signifies the Treaty-makers' intention to provide for a legal framework for the adoption of secondary legislation on good administration to provide for standards of minimum quality and procedural guarantees that would be horizontally applicable to all Union administration.⁸ These rules must ensure that Union administration is indeed 'open, efficient and independent'.

But the Treaties also provide for a number of other provisions with a general administrative law character. Article 296 TFEU includes provisions about the publication of acts, notification and entry into force. Article 10 TFEU and Article 18 and 19 TFEU establish the general principles of non-discrimination. Article 15 and 16 TFEU include provisions on openness of union activities, access to documents held by the institutions and the protection and processing of personal data. All of these provisions lay down significant - albeit widely formulated - principles, and in view of their rather general wording they would need to be specified further in secondary legislation. In some policy sectors, Union secondary legislation, in fact, already provides for plenty of rules of a general administrative law character. For example, Council regulation No 659/1999 codifies and reinforces the procedural rules and principles to be applied by the Commission in the area of state aid, notably with regard to the cooperation between the Commission and Member State authorities.⁹ Similarly, in the area of competition law, Council regulation No 1/2003 establishes rules for effective enforcement of competition rules and the cooperation mechanisms between the Commission and Member State authorities.¹⁰ The 'service directive'¹¹ includes a number of provisions i.e. on controls, quality of service, transparency and publication of information, consultation with interested parties and out-of court dispute resolution. In the area of food safety, regulation No 178/2002 establishes provisions to guarantee that the European Food Safety Authority operates independently and transparently, and remains open to contacts with consumers and other interested groups.¹² Moreover, various provisions of administrative law included in secondary legislation mainly affect Member State

⁸ The insertion of Article 298 TFEU was initiated by Sweden. For the objective of the Article, see the Proposal of the Swedish government concerning the ratification of the Treaty of Lisbon, Regeringens proposition 2007/08:168 Lissabonfördraget at 27, where the government explains that the Treaty now includes, in Article 298 TFEU, a legal basis for regulations on good administration. This entails the adoption of binding rules on good administration for all institutions, bodies and agencies which clarify which requirements of good and efficient administration can be placed on the EU and its civil servants. For the same vision, see the proposal of the Finnish government to the Parliament concerning the approval of the Lisbon Treaty, HE 23/2008 vp, at 253.

⁹ Council regulation (EC) No 659/1999 laying down detailed rules of the application of Article 93 of the EC Treaty, OJ 27.3.1999 L 83/1.

¹⁰ Council regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L1/1.

¹¹ Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communication networks and services, OJ [2002] L 108/51.

¹² Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ [2002] L 31/1.

administration, for example in the area of structural funds and common agricultural policy. In addition, 'soft law' exists in the form of codes of good behaviour and ethical codes, most notably the European Ombudsman's 'European Code of Good Administrative Behaviour' endorsed by the European Parliament, and the Commission's 'Code of Good Administrative Behaviour'.¹³ It could thus be simply concluded that the EU already has sufficient provisions of administrative law in place. Perhaps regulation has already been adopted in those areas where it has been deemed necessary? Why are the current provisions not sufficient?

A major defect in current regulation is that it is very fragmented. Various questions are touched upon in the Treaty or the Charter, but by no means are they exhausted, and some are only treated at a very superficial level. Regulation in secondary legislation in particular policy sectors is uneven, there is little attempt of coherence when regulation exists, many matters remain unregulated and, even where regulation exists, the level of protection might not be quite satisfactory. A significant amount of matters are currently merely regulated in the institutions' internal rules, in particular their Rules of Procedure. As Smith has noted, administrative principles do not currently apply across the administrative practices of Union institutions, or even across the administrative practices of the same institution in different policy sectors. Even the administrative practices of one and the same institution are not the same in different policy sectors. Principles apply to a varying standard in different policy areas, which is understandable in view of the different needs, while in some of those areas they are absent altogether.¹⁴ This point is also supported by case law, which demonstrates that there is currently no horizontally applicable minimum standard that would apply across different policy sectors. In *max.mobil*, a case concerning the amount of the fee payable for the grant of a GSM concession, the Court argued,

Against that background, it must be concluded that the Commission's general duty of supervision and its corollary, the obligation to undertake a diligent and impartial examination of complaints submitted to it, must apply, as a matter of principle, without distinction in the context of Articles 85, 86, 90, 92 and 93 of the EC Treaty, even though the precise manner in which such obligations are discharged varies according to the specific areas to which they apply and, in particular, to the procedural rights expressly conferred by the Treaty or by secondary Community law in those areas to the persons concerned.¹⁵

Such fragmentation of applicable rules affects not only the coherence of the applicable standards but also their accessibility from the point of view of the citizens that might have an interest in invoking them. While the Ombudsman's Code has a similar ambition as Article 298 TFEU to provide for comprehensive and horizontally applicable standards, it has lacked legal force and so far been of limited importance.

¹³ Code of Good Administrative Behaviour. Relations with the public', 2000/633/EC, ECSC, Euratom: Commission Decision of 17 October 2000 amending its Rules of Procedure, OJ [2000] L 267/63.

¹⁴ Smith, *supra* note 1.

¹⁵ T-54/99 *max.mobil v Commission*, para 53. The case was appealed to the ECJ, see Case C-141/02 P, but the Court did not address this particular question.

The European Parliament called on the European Commission already in September 2001, when adopting the Ombudsman's Code through a resolution, to submit a proposal for a regulation containing the Code, the adoption of which would emphasise the binding nature of the rules and principles and their uniform application to all EU institutions and bodies, thereby promoting transparency and consistency. While there might have been previously some question marks concerning a possible legal basis for enacting such a code, after the entry into force of the Treaty of Lisbon, these do not stand any longer, since the introduction of Article 298 TFEU is specifically aimed at curing this problem. While it might be possible to interpret the wording of the Article to the effect that it refers to administration within the institutions instead of regulating the relationship between the institutions and the public,¹⁶ one needs to keep in mind that the Treaty already includes other possible legal bases for the adoption of the institutions' own Rules of Procedures, and that staff regulations, which regulate the relationship between the institutions and their civil servants, are specifically left outside the scope of Article 298 TFEU. Therefore, there was hardly a point in adding another legal basis to regulate such matters. Moreover, the explanations adopted by the Intergovernmental Conference concerning the interpretation of the Article 41 CFR specifically mention the legal basis in Article 298 TFEU 'for the adoption of legislation in the 'interest of an open, efficient and independent European administration', clearly establishing a link between the two provisions.¹⁷ While some have found the wording of Article 298 TFEU less clear than many other legal bases as to its exact ambition, there is no doubt that it would establish a suitable legal basis for the adoption of a regulation on general administrative principles and rules.

¹⁶ See the comment by Mr Legal at the ReNEUAL conference on 15-16 March 2012, where he reportedly argued that Article 298 TFEU was not to be understood as a proper legal basis for a piece of legislation governing relations between the EU institutions and the public. Rather, it was to be understood as establishing a link between the institutions and their supportive administration. The report is available at http://www.reneual.eu/events/ED_conference/ReNEUAL_conference_March_2012/Conference%20Report%20Brussels%20March%2015Th%20%2016Th.pdf.

¹⁷ See the explanations relating to the Charter of Fundamental Right, OJ 2007/C 303/02. See also Article 6(1) TEU, which makes reference to the explanations 'that set out the sources of those provisions'. Jean-Claude Piris, Mr Legal's predecessor as the Director-General of the Council Legal Service, also points out to the linkage between Article 298 TFEU and Article 41 CFR in his commentary of the Lisbon Treaty (at 138) and lists Article 298 TFEU as a new legal basis for adopting regulations on European administration (at 376). See Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge University Press 2010).

3. What is a fundamental right to good administration? Reflections on the charter and case law

Key findings

- The Charter contains some indication of the elements that the right to good administration builds on.
- While jurisprudence has been helpful in clarifying that citizens can rely on certain fundamental principles in their relations with the EU administration, there are a number of significant matters that remain unaddressed in case law or where the Court has been reluctant to enforce clear standards deriving from such principles.
- Secondary legislation is needed to enforce the key principles and procedural requirements. For example, both the principle of impartiality and the principle of fairness – two central Charter-based requirements of good administration – have so far been insufficiently subject to case law. While there is some acknowledgement of the need to act within a reasonable time, this principle alone has not been strong enough to fight unreasonable delays or do away with the practice of ‘implied decisions’. Party access would also require strengthening.

3.1. "Every person has the right to have his or her affairs handled impartially, fairly..."

As the first two principles of good administration the Charter names the principles of impartiality and fairness. For Mäenpää, the principle of impartiality is closely tied to a duty of objectivity: objectives outside those of the administration may not affect its conduct, and decisions taken by the administration should not be affected by personal opinions, national interests or political pressure. The objective of these principles is to ensure general trust in the appropriateness of administration.¹⁸ So far, some elements of these principles have been subject to jurisprudence, but not all. The Court has, in particular, underlined that the quality of process requires a duty of care. In a case called *Technische Universität München*, a preliminary ruling concerning the granting of customs exemption for a scientific instrument imported into the Community, the Court of Justice underlined that

where the Community institutions have [...] a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the

¹⁸ Olli Mäenpää, 'Hyvä hallinto oikeutena ja yleisenä oikeusperiaatteena' in Heidi Kaila, Elina Pirjatanniemi and Markku Suksi (eds.) *Yksilön oikeusasema Euroopan unionissa: juhlaKirja Allan Rosas* (Turku; Institutet för mänskliga rättigheter vid Åbo Akademi, 2008) 465-474 at 467.

*individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.*¹⁹

Similarly in *Hoechst*, a competition case concerning the markets in sorbates, the applicant claimed a breach of the principles of sound administration and equal treatment, in connection with access to a file. The Court established by reference to its earlier jurisprudence that a principle of sound administration was to be observed:

*It must be borne in mind that during an administrative procedure before the Commission, the Commission is required to observe the procedural guarantees provided for by Community law. Among the guarantees conferred by the Community judicial order in administrative procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case. As regards the principle of equal treatment, the Commission cannot [...] ignore that general principle of Community law, which, according to consistent case-law, is breached when comparable situations are treated differently or when different situations are treated in the same way, unless such treatment is objectively justified.*²⁰

In case *Max.mobil* the General Court emphasised, with reference to Article 41(1) CFR, that

*the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States.*²¹

The Court then went on to point out that ‘the obligation to undertake a diligent and impartial examination has already been expressly imposed on the Commission’ in the Courts’ case law: ‘the Commission is required to examine all matters of fact and law brought to its attention by complainants’.²² The Court then went on to conclude that ‘in so far as the Commission is required to undertake such an examination, the fulfilment of that obligation must be amenable to judicial review’.²³ The general principle of proper handling of matters and duty to examine them with care thus exists in case law, based on a principle of sound administration, but it is rather general and would benefit from more detailed regulation, in particular since impartiality is a much wider principle.

¹⁹ C-269/90 *Technische Universität München*, para 14.

²⁰ Case T-410/03 *Hoechst GmbH v Commission*, paras 128-130. See also joined cases T-355/04 and T-446/04 *Co-Frutta Soc. coop. v Commission*, para 55, where the Court similarly emphasised that the Commission must, ‘during the administrative procedure before it, to observe the procedural guarantees provided for by Community law.’

²¹ T-54/99 *max.mobil v Commission*, para 48.

²² *Ibid.*, para 49.

²³ *Ibid.*, para 56.

The principle of fairness then? For Mäenpää, fairness is both about form and about substance. It has a linkage to the principle of legality in denoting a duty to follow the law and apply the relevant rules and procedures. Fairness also entails that decisions affecting the rights and duties of individuals require an appropriate and sufficient legal basis. Fairness requires that the substance of a decision needs to be lawful.²⁴ The Court has not, however, been quite this elaborate in its case law, where its focus has been more on a possible misuse of powers. In *Netherlands v Council*, a case concerning a Council decision relating to the imports of rice, the CJEU established that

*a measure is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.*²⁵

In *O'Hannrachain v the Parliament*, a staff case concerning an appointment made by the European Parliament, the CJEU addressed a claimed 'misuse of powers' and found that

*the concept of misuse of powers has a precise scope and refers to the use of powers by an administrative authority for a purpose other than that for which they were conferred on it. A measure is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.*²⁶

Fairness, however, reaches far beyond the misuse of powers and links to a need to find an appropriate balance between private interests and general interests²⁷ and the principle of proportionality²⁸ The requirement of fairness in administration goes beyond a strict legality check: behaviour can certainly be lawful, and still unfair.

It would thus seem that both the principle of impartiality and the principle of fairness – two central Charter-based requirements of good administration – have so far been insufficiently subject to case law. Thus, various elements of the principles are also difficult to enforce for citizens without more detailed guidance by the legislature. A wider perspective to both principles should thus be introduced. In this respect, the Ombudsman's Code of 2001 is much more elaborate: it includes separate articles on a number of related principles, such as lawfulness (Article 4); absence of abuse of power (Article 7); impartiality and independence (Article 8); objectivity (Article 9); legitimate expectations, consistency and advice (Article 10) and finally, fairness (Article 11).

²⁴ Mäenpää, *supra* note 18, 467.

²⁵ C-110/97 *Netherlands v the Council*, para 137.

²⁶ C-121/01 P, *O'Hannrachain v the Parliament*, para 46.

²⁷ Mäenpää, *supra* note 18, 468.

²⁸ See Article 5(4) TEU: 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.' This is linked to the principle of conferral defined in the same Article: the Union only has those competences that have been allocated to it by the Treaties.

3.2. “...and within a reasonable time”

Second, the Charter requires the administration to act within a ‘reasonable time’. Establishing what exactly counts as ‘reasonable’ in each individual case is, however, difficult. The Courts have had the opportunity to address the question of respect for time limits and a failure to act within a reasonable time repeatedly, since complying with this principle certainly seems to cause problems for the EU administration. First, there is a fair bulk of case law on administrative silence; the so-called implied decisions, i.e. cases in which no decision has in fact been taken within the prescribed time limit, and the effects of this, and whether the relevant decision can still be taken after the expiry of the dead line.²⁹ For example, the *Ryanair* case concerned a request to documents relating to procedures for reviewing State aid under Regulation 1049/2001; a procedure that includes very specific time limits for the handling of requests. The General Court found that when an explicit time limit exists, and a rule exists for extending it once, then failure to reply by the expiry of the extended period constitutes an ‘implied decision’ to refuse access.³⁰ The *Vieira* case³¹ related to the suspension of payment of the balance of the financial aid granted to a project relating to fisheries. The applicant claimed that the Commission had infringed its duty to act within a reasonable time, since it had taken it more than four years from the applicant’s request for payment to adopt the contested decision. The applicant referred to a general principle,

*based on the need for legal certainty and good administration, which requires the administrative authority to exercise its powers within a given period in order to protect the legitimate expectations which those subject to it have of it. Therefore, when the Commission requires the reimbursement of financial aid after an unreasonable delay, it is not acting with the necessary diligence, is not complying with the requirements of legal certainty and is no longer acting within the limits of good administration.*³²

The Court found that ‘observance of a reasonable time-limit is a general principle of Community law which the Commission must observe in administrative proceedings’ and that in the present case the procedure had been long, with periods of inactivity with the Commission (paras 167-169). However, the Court was not convinced about the effects of the delay: in its view, the ‘breach of the principle of a time limit, if proved, does not justify automatic annulment of the contested decision’.³³ The delay in acting did not automatically mean that a decision to suspend the payment could not have been taken.

The case law further indicates that in practice the institutions ultimately have flexibility in following dead lines, and to take decisions after their expiry. In many cases decisions are taken only after the expiry of time limit, when it has become evident that the affected

²⁹ See e.g. Cases T- 494/08, T-500/08 and T-509/08, *Ryanair Ltd v Commission*, Joined cases T-355/04 and T-446/04 *Co-Frutta Soc. coop v the Commission*; Case T-42/05 *Rhiannon Williams v the Commission*.

³⁰ Cases T- 494/08, T-500/08 and T-509/08, *Ryanair Ltd v Commission*, para 40.

³¹ Joined Cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira v the Commission*.

³² Para 165.

³³ Para 170.

person will appeal the 'implied decision'. In *Co-Frutta Soc. coop.*,³⁴ for example, the General Court found that a decision adopted after the expiry of the deadline is not automatically annulled. Instead, the Commission could withdraw its 'implied decision' by adopting an express one at a later stage, after the expiry of the time limit. In the area of competition, the Court has addressed a claim by *Hoescht* that the Commission had breached the principle that the procedure must take place 'within a reasonable time'. The time between its first request of information and the Commission statement of objections had been more than 42 months, of which the Commission was inactive for almost 31 months. However, the Court underlined the flexibility built into the legal framework: Regulation No 2988/74 provided a five-year limitation period in respect of breaches of the Community competition rules. The Court found that since the Regulation establishes

*a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Commission competition rules [...] there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period.*³⁵

Therefore, it was not possible to question whether the period of five years, in fact, was reasonable or not. *Z v the European parliament*,³⁶ a staff case concerning the disciplinary measure of downgrading a staff member, concerned another situation; whether the specific time limits in Annex IX to the Staff Regulations constituted a complete set of rules which the disciplinary authority must comply with. The Court was not convinced and referred to its

*settled case-law that the time-limits laid down in Article 7 of Annex IX to the Staff Regulations are not mandatory but constitute rules of sound administration with a result that a failure to observe those time-limits may render the institution liable for any damage to those concerned but cannot of itself affect the validity of a disciplinary sanction after their expiry.*³⁷

The case law so far demonstrates that while there is some acknowledgement of the need to act within a reasonable time, this principle alone has not been strong enough to force the administration to act within a 'reasonable time'. Setting exact dead lines is currently left to secondary legislation, and the assessment of their reasonableness is left to the legislature in adopting them. Administrative silence is an obvious problem, but the way of dealing with it proposed by applicants in case law – decision taken too late is not valid – might not be a universal solution, noting the difference in EU administrative procedures and their objectives. Neither is the –very attractive – solution of an obligation to disclose documents if deadlines are not respected advocated by the European

³⁴ Joined cases T-355/04 and T-446/04 *Co-Frutta Soc. coop v the Commission*, para 71.

³⁵ Case T-410/03 *Hoechst GmbH v Commission*, paras 223-224.

³⁶ Case C-270/99 P *Z v the European Parliament*.

³⁷ Para 21.

Parliament in relation to Regulation 1049/2001.³⁸ The Code of 2001 is much more ambitious than current case law in relation to time limits and sets a time frame of ‘no later than two months’ for decision-making, replying letters and answering administrative notes (Article 17). If the matter is complex and cannot be decided within this time, the Code requires the official to inform of the delay and to provide a definitive decision ‘in the shortest time’. But even alternatives to fixing an universally applicable deadline – quite a challenge considering the various procedures involved – exist. Instead, one could envisage a procedure aiming at ‘forcing’ the administration to act, making sure that a decision is always taken within a reasonable time limit. The possibility of suing an institution for failure to act under Article 265 TFEU is hardly an attractive option for an individual and hardly creates a sufficient remedy to a relatively wide-spread phenomenon.

3.3. The right to be heard

In addition to the above-mentioned core principles, good administration requires respect for the rights of defence. Article 41(2)(a) CFR establishes a ‘right of every person to be heard, before any individual measure which would affect him or her adversely is taken’. In brief, an individual has the right to hear about the facts affecting his or her case; thus the administration is under a duty to create an opportunity to examine what facts might affect the handling of a case, evaluate them and to examine whether the facts are correct, and that all facts that are relevant for the case have been covered.³⁹

The right to be heard has also been analysed in case law.⁴⁰ In practice, the Court has required the strict observance of the principle of hearing before measures with adverse effects are taken. In *Fiskano*, the CJEU stressed that the

*observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question.*⁴¹

With reference to its earlier case law, the Court argued that the

*observance of the right to be heard requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission imposes the penalty.*⁴²

³⁸ See Report on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)), Committee on Civil Liberties, Justice and Home Affairs by Heidi Hautala, A7-0245/2011. Para 39: ‘Points out that in several cases extensive delays have led to proceedings being started before the Court of Justice based on a lack of response, followed by a late Commission response [...]; suggests introducing consequences, such as the obligation to publish the documents, if the deadlines are not respected.’

³⁹ Mäenpää, *supra* note 18, 467.

⁴⁰ For a first expression, see 32/62 *Alvis v the Commission*.

⁴¹ C-135/92 *Fiskano v the Commission*, para 39.

⁴² *Ibid.* para 40-41.

This right was – unlike some of the other rights discussed above – not dependent on whether provision had been made of it in the relevant secondary legislation: it was to be respected irrespective of the details of the applicable procedure. In *Lisrestal*, the General Court addressed a question of depriving assistance under the European Social Fund, and again underlined the need to respect for the rights of defence:

*That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for the decision at issue.*⁴³

Consequently,

*It follows that the Commission, which alone assumes legal liability to the applicants for the contested decision, was not entitled to adopt the contested decision without first giving those undertakings the possibility, or ensuring that they had had the opportunity, of effectively setting forth their views on the proposed reduction in assistance.*⁴⁴

An omission to respect the right to be heard has also led to a duty to pay damages. In *Fresh Marine v Commission*⁴⁵ the applicant claimed that it had not been informed by the Commission of the essential facts and considerations on the basis of which it intended to impose provisional duties on imports on its products, and argued for a right to comment on the Commission's findings, which would have made it possible for the company to avoid damage. The Court noted that the Commission had amended the relevant report unilaterally without hearing the applicant, and in doing so, 'committed an error which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence'.⁴⁶ Since there was a causal link between the damage and the infringement of the applicant's right to a fair hearing, the Commission was also liable for one half of the loss of profit suffered by the applicant.

In case law, the right to be heard is limited, like the Charter provision itself, to cases in which the intended measure would have an adverse effect. The CJEU addressed this question specifically in *Windpark Groothusen*, a case concerning a procedure for the submission of projects where the candidates were not given, due to the great number of applications and the work load entailed in evaluating them, a further opportunity to express their views after the submission of their proposal, unless specifically requested to do so by the Commission services. The CJEU accepted this practice with reference to its *Fiskano* ruling quoted above, and argued that

*a person's right to a hearing before adoption of an act concerning that person arises only where the Commission contemplates the imposition of a penalty or the adoption of a measure likely to have an adverse effect on that person's legal position.*⁴⁷

⁴³ *Lisrestal v Commission*, Case T-450/93, para 42.

⁴⁴ Para 49.

⁴⁵ Case T-178/98 *Fresh Marine Company AS v Commission*. The case was appealed by the Commission but held in appeal, C-472/00 P *Commission v Fresh Marine Company*.

⁴⁶ Para 82.

⁴⁷ C-48/96 P *Windpark Groothusen*, para 47.

In the context of writing the new Article 298 Regulation, it might be possible to reconsider extending this approach, presuming that it would be legally possible to go further than the Charter provision in this respect. The reason is simple: it might not always be clear whether the intended measure is positive or negative; and a measure might be positive for some while being negative for others. For this reason, a right to express an opinion could also be wider and extend to situations affecting an individual – one way or another - unless it is evident that no hearing is needed. Also in this respect, the Ombudsman’s 2001 Code (Article 16) is wider than current case law. In addition to underlining the rights of defence in cases where the rights of individuals are involved, it states:

Every member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken.

While the general public’s right to participate in decision-making and the right of a party to be heard are two distinct situations and should be kept separate, the logic behind the formulation of the 2001 Code would seem to be worthy of examination, since it brings in rather nicely some of the logic of the new Treaty provisions relating to citizen participation in decision-making.⁴⁸

3.4. The right to access to one's own file

The Charter (Article 41(2)(a) CFR) establishes the right to access one’s own file, another question addressed in case law. In *Aalborg Portland v Commission*, a case relating to European cement producers and trade associations, the applicant argued that it had not been aware of all the documentation used against it when the decision was made. The CJEU was not fully convinced:

[t]he failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement [...]and, second, that the objection could be proved only by reference to that document [...].⁴⁹

The Court placed the burden of proof on the affected undertaking:

It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence. [...]Where an exculpatory document has not been communicated, the undertaking concerned must only establish that

⁴⁸ Article 11 TEU stipulates that the institutions shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions must maintain an open, transparent and regular dialogue with such associations and civil society at large; and the Commission in particular is placed under an obligation to conduct broad consultations with concerned parties.

⁴⁹ C-204/00 P *Aalborg Portland v Commission*, para 71.

its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission [...] It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine.⁵⁰

The burden of proof seems rather heavy keeping in mind that the process – even if administrative in nature – has the characteristics of a ‘fair trial’ situation. From the party perspective, knowing what is in your file is a necessity in order to be able to evaluate whether the institution has acted correctly. The opposite, again, – not knowing what is in your file and on what merits your decision has been taken- a factor that causes unnecessary litigation. Ultimately, it is also a matter that either increases or decreases trust in the institutions and for this reason is a key element in good administration. Question marks certainly exist as to whether the balance in current case law is correct.

This conclusion is further emphasized by the fact that jurisprudence on party access also exists from the implementation of Regulation No 1049/2001, which regulates another related question, public access to documents. It would seem that in some policy sectors, access of persons (natural or legal) to their own information in Commission files is so restricted under the current rules that the implementation of the EU rules of public access often provide a tempting opportunity to test whether they might in fact generate a more generous outcome for the applicant than party access.⁵¹ As the Commission has repeatedly pointed out, limited or non-existing party access creates pressure on the public access rules, which has resulted in a number of Court cases concerning the relationship between the different access rules. The recent *TGI* affair, for example, concerned the state aid procedure, under which interested parties may submit comments to the Commission, and will later receive a copy of its decision, but no provision is made for access to its files.⁵² The existence of such cases⁵³ bears clear witness to problems with

⁵⁰ *Ibid.*, para 73-75.

⁵¹ See e.g. Case T-237/02 *Technische Glaswerke Ilmenau v Commission* [2006] ECR II-5131, a General Court ruling that was later reversed by the ECJ.

⁵² C-139/07 P *Commission v Technische Glaswerke Ilmenau*, judgment of the Grand Chamber of 29 June 2010, not yet reported. The *TGI* case concerned the State aid procedure; Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty OJ 1999 L 83, p. 1. In its ruling the CJEU established that the lack of party access under the state aid rules affected the interpretation of the rules on public access, so that a ‘general presumption’ of no public access could be upheld in the relevant state aid procedure. For a discussion, see Päivi Leino, ‘Just a little sunshine in the rain. Comment on the 2010 jurisprudence by the European Court of Justice on access to documents’, 48(4) *Common Market Law Review* (2011) 1215.

⁵³ See also the recent CJEU rulings of 28 June 2012 in Case C-404/10 P, *Commission v Editions Odile Jacob SAS*, where Odile Jacob had asked for documents that would enable it to present more convincing arguments in its actions for annulment, para 146; and Case C-477/10 *Commission v Agrofert Holding a.s.* relating to merger control proceedings, paras 85-86.

party access: a party should always enjoy stronger rights when compared with the general public, which gains access to information that can be released universally presuming that there is no harm by such release. Party access is by definition limited to the party; thus the harm of disclosure is more limited, and access can certainly in most cases be justified with securing the affected party's right of defense.

In general, the Court has been reluctant to use the rules on public access to compensate defects in other access regimes. In *Sison* the Court underlined the purpose of Regulation No 1049/2001 'to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them'.⁵⁴ According to the Court,

*the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected [...].*⁵⁵

In short, the Court has pointed out that the matter of access for interested parties to a file ought to be settled elsewhere than under the public access rules. This could be usefully done in the context of adopting general rules on administrative law, which could include provisions on the central principles and applicable minimum standards. In this context, appropriate provision would also need to be made to protect two other legitimate values mentioned in the same Charter paragraph, the need for confidentiality and to protect business secrets. Access to one's own file certainly should not entail an automatic right to access the business secrets of other involved companies.

3.5. Duty of reasoning

Article 296 TFEU establishes that 'legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties'. In Article 41(2)(c) CFR and in case law the obligation has been extended to administrative decisions. In *UNECTEF v Heylens*, a case concerning football trainers' qualifications, for example, the Court established that

*[...] the competent national authority is under a duty to inform [Community workers] about the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request. In view of their aims those requirements of Community law, that is to say, the existence of a judicial remedy and the duty to state reasons, are however limited only to a final decision refusing to recognize equivalence and do not extend to opinions and other measures occurring in the preparation and investigation stage.*⁵⁶

⁵⁴ In Case C-266/05 P, *Jose Maria Sison v Council*, in which the CJEU upheld the earlier General Court ruling, joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council*, para 43.

⁵⁵ Case C-266/05 P, *Jose Maria Sison v Council*, [2007], para 47.

⁵⁶ Case 222/86 *UNECTEF v Heylens*, paras 15-16.

In *Belgium v the Commission*, a case concerning the validity of a Commission state aid decision prohibiting certain financial assistance to a steel undertaking, the CJEU argued that

It is settled case-law [...] that the statement of reasons required by that provision must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.⁵⁷

In *Williams*,⁵⁸ a case relating to a request for access to preparatory documents relating to the GMO directive, the Court underlined that the ‘implied refusal’ by the Commission – failure to answer – also implied an infringement of the obligation to state reasons.⁵⁹ Similarly, no indication of remedies is given. However, the Court has accepted that even an implied decision can be appealed.⁶⁰

In general, the duty to reason a decision seems rather well-acknowledged in principle (see also Article 18 of the 2001 Code), even if a breach of this duty is often in practice claimed before the Courts.⁶¹ While it may sometimes seem an unnecessary and technical burden from the officials’ point of view, for the individual it is the only guarantee that all the relevant facts and rules have been taken into account when his or her case has been examined and the decision taken. In this context, it is good to note that proper reasoning also has a clear linkage with the trust of individuals in the administration acting correctly in general. As such, it reduces the need of unnecessary litigation, if the party knows the grounds on which a decision has been taken. In short, reasoning is a key element of good administration.

3.6. The right to have the Union make good any damage

Article 340 TFEU establishes the principle of non-contractual liability, stating that ‘the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’. While the matter is included in Article 41(3) CFR, it is in practice regulated elsewhere, and there is also an extensive amount of case law on this question. Thus it is not clearly an issue for the future Article 298 Regulation.

⁵⁷ C-197/99 *Belgium v Commission* para 72.

⁵⁸ Case T-42/05 *Rhiannon Williams v the Commission*.

⁵⁹ Para 93.

⁶⁰ See e.g. Case T-42/05 *Rhiannon Williams v the Commission*, para 98.

⁶¹ A breach of proper reasoning seems to be a standard part of e.g. the cases involving the implementation of Regulation No 1049/2001.

Relevantly for the discussion on good administration, however, in *Area Cova* the applicant claimed for non-contractual liability based on an infringement of sound administration. The case related to fisheries quotas in the Northwest Atlantic and the way these quotas had been distributed. The Court refused to find that the criteria for liability for losses were met. It argued:

*Community law confers a right to reparation [...] where three conditions are met, namely that the rule of law infringed is intended to confer rights on individuals, that the breach is sufficiently serious, and, finally, that there is a direct causal link between the breach of the obligation resting on the Community and the damage sustained by the injured parties. Concerning the first condition, it must be held that the applicants have not pleaded the infringement of a rule of law intended to confer rights upon individuals. The illegality they complain of, supposing it to be established, consists only in the infringement of the principle of sound administration. The first condition for the Community's non-contractual liability coming into operation has therefore not been established.*⁶²

What the Court seems to say is that a breach of the principle of sound administration is not clearly a breach of a 'rule of law'. Once the Article 298 Regulation is adopted, and more detailed provisions of good administration are in place this question may at least in some cases be answered differently. It ought to be carefully examined whether an alleged breach of the Article 298 Regulation could alone stand as a ground for appeal and thus ultimately lead to Court proceedings, or whether alternative ways of administrative review should be examined.⁶³

3.7. The right to communicate with the institutions in any of the Treaty languages

Under Article 20(2)(d) TEU, EU citizens have the right 'to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language'. A similar provision exists in Article 41(4) CFR and the 2001 Code, where it is extended to 'every person'. The Code specifically includes 'as far as possible to legal persons such as associations (NGOs) and companies'.

The language regime of the institutions is also a question that is largely regulated elsewhere. The principles are based on Regulation No 1⁶⁴ governing the use of languages in the institutions. Under Article 6, the institutions 'may stipulate in their rules of procedure which of the [official] languages are to be used in specific cases'. The Charter provision is thus dependent on this provision, and consequently also on the arrangements decided in the institutions' rules of procedure. While it is clear that the

⁶² T-196/99 - *Area Cova and Others v Commission and Council*, para 42-44.

⁶³ For one possibility, see Article 10 of Regulation No 1367 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Under the said provision, NGOs may request for internal review in case of an alleged administrative omission.

⁶⁴ Regulation No 1 determining the languages to be used by the European Economic Community, OJ 358/58.

possibility of citizens to communicate with the institutions in their own language is of a particular practical and symbolic importance, it is equally clear that it would be impossible to provide every single document in all official languages, especially thinking of the EU Agencies with limited resources, such as the European Institute for Gender Equality with a limited staff of forty-two.

The Court has had understanding for such difficulties. The *Kik* case concerned the refusal by the Office for Harmonisation in the Internal Market (OHIM) to register a trademark and the linguistic arrangements of the Office⁶⁵. The CJEU argued:

*As the appellant points out, the Treaty contains several references to the use of languages in the European Union. None the less, those references cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances.*⁶⁶

As regards the need to translate all decisions, the Court found that

*an individual decision need not necessarily be drawn up in all the official languages, even though it may affect the rights of a citizen of the Union other than the person to whom it is addressed, for example a competing economic operator.*⁶⁷

The Court had understanding for the practical difficulties involved:

*It follows from all of those facts that the language regime of a body such as the Office is the result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings, but also between the interests of applicants for Community trade marks and those of other economic operators in regard to access to translations of documents which confer rights, or proceedings involving more than one economic operator, such as opposition, revocation and invalidity proceedings.*⁶⁸

In the *Eurojust* case,⁶⁹ ultimately declared inadmissible by the Court on the grounds that it concerned the ex-III-pillar with limited Court competence, Advocate General Maduro had the opportunity to consider the language arrangements of the Union in depth. He linked the EU language policy with rights and fundamental objectives of the Union and underlined that

the principle of respect for the linguistic diversity of the Union applies, as a fundamental requirement, to all the institutions and bodies of the Union. That said, it is a requirement that cannot be regarded as absolute. It is necessary to accept restrictions in practice, in order to reconcile observance of that principle with the imperatives of institutional and administrative life. But those restrictions must be limited and justified. In any event, they

⁶⁵ C-361/01 P *Kik v OHIM*.

⁶⁶ Para 82.

⁶⁷ Para 85.

⁶⁸ Para 92.

⁶⁹ C-160/03 *Spain v Eurojust*.

*cannot undermine the substance of the principle whereby the institutions must respect and use all the official languages of the Union. It is clear that it is in the context of communications between the institutions and the citizens of the Union that the principle of respect for linguistic diversity deserves the highest level of protection. In such cases, that principle is linked with a fundamental democratic principle of which the Court takes the greatest care to ensure observance.*⁷⁰

AG Maduro then underlined the importance of the principle in legislative matters

*for the purpose of exercising rights of participation attaching to European citizenship, respect for linguistic diversity must not be exposed to technical difficulties which an efficient institution can and must surmount. Those rights also extend to relations between citizens and the administration. In the context of administrative procedures, it is essential that interested parties, whether Member States or citizens, should be able to understand the institution or body which they are communicating.*⁷¹

The linguistic arrangements of the institutions would not seem to be primarily a matter for the Article 298 Regulation. It is, however, important that – due to its linkage with various fundamental rights – the matter is settled by legislation in a manner that secures the possibilities of the administration to function efficiently, and simultaneously allocating the necessary resources to comply with the requirements. Quite crucially, it should not be up to individual officers to decide on a case by case basis what language they choose to use in their relations with the public.

3.8. Conclusion on case law

The adoption of comprehensive and legally binding rules on good administration is both important and urgent also since case law demonstrates blind spots where individuals have not been able to enforce their rights without the support of a sufficiently detailed legal provision. In practice, the principle of good administration alone has not been strong enough to confer detailed rights that individuals can enforce in Courts. For example in *Tillack v the Commission*, a case relating to internal administrative investigations conducted by the European Anti-Fraud Office (OLAF), the General Court clearly stated that

*the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals [...], except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union [...], which is not the case here.*⁷²

⁷⁰ Opinion of AG Poiares Maduro, delivered on 16 December 2004, Para 42-43.

⁷¹ *Ibid.*

⁷² T-193/04 *Tillack v Commission*, para 127.

In general, the individuals seeking to enforce what they have deemed as their rights with reference to a principle of 'good' or 'sound' administration have, in fact, lost their cases.⁷³ In *Burban*,⁷⁴ a staff case, where the applicant claimed for a 'duty to have regard for the interests of officials and the principle of proper administration, the CJEU refused to 'read in' legal obligations for the institutions with reference to a 'principle of proper administration'.

*[...]the appellant cannot, by relying on the duty to have regards to the interests of officials and the principle of proper administration, transform into an obligation that which the legislature viewed as a mere possibility [...].*⁷⁵

In fact, a significant amount of case law exists with references to a principle of 'sound administration', it is difficult to identify a case where the principle alone would have been determinative; and even when this has been the case, the finding has been directed towards flaw in the Member States' own administrative procedures and not the EU institutions.⁷⁶ As Fortsakis has demonstrated, the principle of good administration has a 'fuzzy form',⁷⁷ visible also in how references to a 'right to good administration' also signify some uncertainty about the precise meaning of the principle:

*For in order to be of use, i.e. capable of serving as a legal basis that would enable users to obtain effective judicial protection, any reference to this general principle needs to be specific, indicating the precise rule derived from this principle in a given case.*⁷⁸

This evidences how general principles are not suitable, and not even intended to be used independently by courts and the administration, who would need to be able to rely on much more detailed provisions in their implementation practice. So far, case law has also demonstrated that the efficiency of Commission supervision and regulation and EU's economic interests have affected the quality of procedural standards of parties in relation to the prerogatives of the administration.⁷⁹ Focus has been more on functioning markets than on the rights of citizens, which of course is a familiar claim from other fora: Human rights are seen as a means to legitimate the market economy, which is the true constitution of Europe.⁸⁰ In this environment, the essence of the Charter has been to prove that the EU is also concerned with the effective protection of the rights of its

⁷³ See e.g. *Z v Parliament*, [2001] ECR I-9197.

⁷⁴ C-255/90 P *Jean-Louis Burban v the European Parliament*, para 20. See also Case T-15/91 *Josée Bollendorff v European Parliament*.

⁷⁵ *Ibid.*, para 20.

⁷⁶ See Smith, *supra* note 1.

⁷⁷ Theodore Fortsakis, 'Principles Governing Good Administration', 11(2) *European Public Law* (2005), 207-217 at 217.

⁷⁸ *Ibid.*, 210.

⁷⁹ Mäenpää, *supra* note 18, 473.

⁸⁰ For a discussion, see Päivi Leino, "All Dressed Up and Nowhere to Go: The Debate on the EU Charter of Fundamental Rights", XI *Finnish Yearbook of International Law* (2000) 37-81.

citizens and not only with economic market integration.⁸¹ If the Charter is to deliver any of its promises, this is a balance that ought to be urgently reconsidered. Concretising the right to good administration provides a so far wasted opportunity for adjusting this balance.

⁸¹ J.H.H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' 6(2) *European Law Journal* (2000) 95-97 at 95.

4. Institutional culture: citizens and EU administration

Key findings

- Case law and Ombudsman practice demonstrate that citizens experience problems in their relations with the EU administration in many sectors (infringements, tenders and grants; contracts, competition and selection procedures) and in relation to certain horizontal challenges (e.g. access to information and administrative silence).
- Problems in administration may ultimately lead to the realization of EU objectives being hampered. Clear and foreseeable rules increase the efficiency of administration and the smooth running of administrative procedures: both the citizens and the officials are aware of the relevant requirements and procedural steps.
- In addition to providing more detailed guidance on the implementation of the general principles of good administration, the future Article 298 Regulation should provide for standards relating to the handling of a specific matter. Such provisions are the ones that are currently the most lacking.
- National experiences suggest that proper rules of administrative process save money.

4.1. Current problems

There are currently no reliable statistics of the problems that citizens are facing in their relations with the EU administration, which of course makes analysing them more difficult. Case law discussed earlier demonstrates that questions relating to good administration cause litigation, partly because it is unclear when and what administrative standards apply and what they can be expected to deliver. Uncertainties exist both for individuals and for officials as regards for example the procedural steps to be taken. Decisions that are not experienced as fair and just cause dissatisfaction and ultimately litigation. Based on case law, problems seem to exist e.g. in relation to requests for documents and information, and in the area of competition law relating to various different procedures and the procedural rights of companies. The allocation and reimbursement of funding cause litigation, as do staff cases. Case law seems to affect the Commission the most even though agencies are also involved. A particular problem is caused by administrative silence and the observance of time limits. At the same time, case law has only limited capacity to serve as an indicator of problems since it exists to a narrow extent. Only a margin of the cases in which uncertainties exist ultimately reach the litigation stage since access to courts is rather limited and is very costly, it takes a long time to get a ruling, and the prospects of winning a case based on 'good administration' are rather slim.

Another possible way of demonstrating the ways in which individuals and the EU administration meet and where problems currently exist is to examine the reports of the European Ombudsman, who of course is the main EU body charged with the task of addressing possible instances of 'maladministration' in the EU.⁸² Based on the two most recent reports of the European Ombudsman (2010 and 2011),⁸³ it would seem that the main concerns raised by the individuals in their contacts with the Ombudsman have related to various rather fundamental questions of good administration, such as

- failure to provide information or grant access to documents
- incorrect application of substantive and/or procedural rules
- failure to respect reasonable time limits for taking decisions
- failure to state the grounds of decisions and the possibilities of appeal
- failure to reply to letters by citizens, indicating the competent official
- possible discrimination
- failure to observe a duty of care
- failure to communicate in the language of the citizen.

Many of these concerns are familiar from case law, and relate exactly to the rights specifically mentioned in the CFR as elements of good administration, thus underlining that there is room for improvement. For example, indicating a time limit for handling a matter, and following it in practice, seems to be a rather general problem: From reading the reports of the Ombudsman one gets the impression that delays in taking a decision and delays in replying occur frequently, as do late registration and late answers to requests.⁸⁴ From the point of view of citizens, waiting for a decision, and perhaps not even knowing when it is to be taken, is a serious problem, and not only when there is money involved.

A fair bulk of complaints concern public access to documents, questions relating to data protection or the implementation of staff regulations. These are all key questions relating to good administration, as well, but are cases in which the future Regulation on good administration would perhaps play a lesser role. Specific procedures apply to requests for access to documents (Regulation No 1049/2001) and processing of personal data (Regulation No 45/2001), and based on the provisions of Article 298 TFEU the implementation of Staff Regulations falls – at least to certain extent - outside the scope of the future Article 298 Regulation. Nevertheless, horizontal principles, such as a duty to reply or to reason a decision are applicable throughout EU action, and if problems persist, then perhaps strengthening horizontal regulation is a viable and most efficient option.

⁸² According to Article 228 TFEU, the Ombudsman is 'empowered to receive complaints [...] concerning instances of maladministration [...]. He or she shall examine such complaints and report on them. In addition, the Ombudsman shall conduct inquiries, the results of which he reports to the institution concerned and the European Parliament.

⁸³ See the Annual Report of the European Ombudsman 2010 and 2011, available at the Ombudsman's website.

⁸⁴ See e.g. cases 1438/2008/DK; 1302/2009/TS; 355/2007/FOR.

A considerable part of alleged maladministration, however, concerns sectors that could and should be addressed by the future Article 298 Regulation, and in which regulation relating to good administration is currently weaker. All of these are areas where EU administration – mainly the Commission, but also some of the Union agencies – come in direct contact with the citizens. As regards the substance, these questions relate to

- infringement proceedings
- award of tenders and grants
- execution of contracts
- competitions and selection procedures.

Infringement proceedings (Article 258 TFEU) have traditionally been an area that has given rise to many complaints, and where the Court has proved reluctant to use its imagination to develop procedural guarantees for the complainants.⁸⁵ So far, the status of individual complainants and the rights they might enjoy in the procedure have been largely dependent on the Commission's own rules and recommendations, and thus on its own choices as regards its internal working methods. The procedural safeguards are mainly based on a Commission Communication from 2002.⁸⁶ In this area, in 2010 and 2011 the Ombudsman reported 'a number of shortcomings', for example a 'recurrent problem' relating to a failure to register complaints.⁸⁷ Other problems included alleged failures to hear the complainant before rejecting a complaint,⁸⁸ with respecting the rights of defence,⁸⁹ and extensive delays in communicating with complainants⁹⁰ In April 2012 the Commission issued a new Communication⁹¹ in a rather apparent attempt to reply to criticisms raised in the discussions of the JURI Committee and by the European Ombudsman. The communication addresses many of the issues raised by the European Ombudsman in previous years, such as a general principle of acknowledging complaints within fifteen days of receiving them and certain fundamentals relating to communication with the complainant, but maintains the same legal format with limited capacity to bring about clear qualitative changes. While granting a formal status to the complainants in the Article 258 TFEU infringement procedure would seem to fall outside the scope and objectives of the Article 298 TFEU exercise on good administration, the latter provision could be used to establish certain procedural safeguards, such as the registration of complaints, and a duty to inform complainants at certain stages of the proceedings.

⁸⁵ See e.g. Case C-141/02 P *Commission v T-Mobile Austria GmbH*, [2005] ECR I-1283.

⁸⁶ Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, OJ 2002 C 244, p. 5.

⁸⁷ See e.g. complaints nr 1009/2009 KM and OI/3/2009/MHZ); 3403/2008 OV.

⁸⁸ 3403/2008 OV.

⁸⁹ 705/2010/ANA.

⁹⁰ 489/011/MHZ,

⁹¹ Communication from the Commission to the Council and the European Parliament. Updating the handling of relations with the complainant in respect of the application of Union law. Brussels, 2.4.2012 COM(2012) 154 final.

Award of tenders and grants is another significant area in which citizens have direct contacts with the Commission and some agencies. The Commission awards grants to support particular projects or organizations that further EU interests or contribute to the implementation of an EU program or policy. This is serious money: In total, in 2007-2013 the EU financial programmes account up to €975 billion.⁹² Concerns exist relating to the eligibility of costs in relation to grants⁹³ and the handling of research proposals⁹⁴. The Ombudsman has observed that the available EU research funding is bureaucratic and that obligations have been created that are disproportionate for beneficiaries.⁹⁵ Many complaints in the area concern the principle of fairness when recovering grants or requesting reimbursement.⁹⁶ Those affected are individual researchers, research communities, societies and NGOs, many of them with limited means and high dependency on the funding. In their situation, questions relating to the eligibility of costs and fairness in implementation are extremely significant. Moreover, if an application process is too burdensome with excessive bureaucratic features, then of course the attractiveness of Union funding might suffer, affecting the quality of projects funded with EU means. This is true in case the burden of applying is out of proportion considering the prospects of gaining the applied financing.

The Commission and other institutions also engage in contracts with private parties in order to buy goods and services, such as studies, technical assistance or consultancy. In relation to the execution of contracts, the Ombudsman has examined complaints relating to late payment, eligible costs and subcontracting, and also various instances concerning the principle of fairness. Late payment is a serious problem from the perspective of private parties, and has provoked the Ombudsman to conduct a number of own-initiative inquiries to the matter.⁹⁷

Many complaints to the Ombudsman have also concerned competition and selection procedures, in particular failures to ensure equal treatment⁹⁸ or respect for the right to appeal,⁹⁹ and breach of legitimate expectations¹⁰⁰. Most of these cases concern the European Personnel Selection Office, but also FRONTEX and the European Economic and Social Committee.

Many complaints also concern obvious errors, such as a case concerning an alleged administrative error regarding fishing quotas for the West of Scotland, where the Commission had mistakenly interchanged the relevant quotas to those concerning the

⁹² See e.g. New funds, better rules. Overview of new financial rules and funding opportunities 2007-2013. Luxembourg, Office for Official Publications of the European Communities, 2008.

⁹³ See e.g. complaints 1598/2008/MHZ; 255/2009/JF.

⁹⁴ Complaint 485/2008/IP.

⁹⁵ Complaint 1786/2010/PB.

⁹⁶ 2605/2009/MF; 1992/2010/RT.

⁹⁷ OI/5/2007/GG; OI/2/2010/GG.

⁹⁸ Complaint 1994/2008/IP.

⁹⁹ Complaint 923/2009/FOR.

¹⁰⁰ Complaint 2924/2007/TS.

North Sea.¹⁰¹ Another case concerned information published by the Commission for affected air passengers following the eruption of an Icelandic volcano in April 2010. The Ombudsman considered a complaint concerning misleading information, which it had taken the Commission two weeks to conclude that it was, in fact, misleading and more than a month to remove from its website.¹⁰² There are cases that concern the correction of obvious errors¹⁰³ or that the institution is giving inconsistent, inaccurate or misleading information.¹⁰⁴ Recently the Ombudsman has also had reason to criticise the European Council for giving ‘laconic, dismissive and disrespectful’ replies to a Polish citizen, who had, having learned that the President of the European Council had used three service cars for a holiday trip with his extended family, wondered whether this could be true.¹⁰⁵ For the European Council, this was ‘normal procedure in case of such high positioned public figure and his family’. The Ombudsman argued that ‘European citizens will only trust the Institutions and accept the European Union if they can see that EU Institutions respect and consider their questions’ and suggested that the European Council apologise to the complainant for its behaviour.

It is clear that the lacunae in regulation discussed in previous sections affect the quality of the relationship between the EU administration and the citizens, since the rights that can be enforced by citizens are few and very diverse. The possible need to adopt more comprehensive rules of good administration has been discussed for quite some time, especially before and after the adoption of the Commission 2001 White Paper on European Governance.¹⁰⁶ In practice two alternatives for the codification of applicable administrative law principles have been suggested. First, the idea of a formally non-binding soft law instrument, which has already resulted in the codes of good administration by the European Ombudsman and by the Commission. Second, the entry into force of the Lisbon Treaty has strengthened the calls for a Regulation on the matter to be adopted.¹⁰⁷ The proponents of softer methods of regulating have argued that a scheme based on legally enforceable rules might risk to ‘deflect attention from the more important need to promote a more responsible and service-oriented administrative culture’.¹⁰⁸ Normative steering of the administration might, some argue, hinder its efficiency, pointing out that laws and other legal norms might even be largely detrimental for the administration. Efficiency might be best served if the administration were given open and broad goals with decisions on concrete details and means to be left

¹⁰¹ Complaint 865/2008/OV.

¹⁰² Complaint 1301/2010/GG.

¹⁰³ Complaint 413/2010/BEH.

¹⁰⁴ 920/2010/VIK; 1574/2010/MMN.

¹⁰⁵ Complaint 808/2011/MHZ.

¹⁰⁶ European Governance – A White Paper. Brussels 25.7.2001, COM(2001) 428. The Commission itself only referred to the possibility of ‘complementing the EU’s policy tools more effectively with non-legislative instruments’. Ibid, 2.

¹⁰⁷ See also Eva Nieto-Garrido, ‘Possible Developments of Article 298 TFEU: Towards an Open, Efficient and Independent European Administration’, 18(2) *European Public Law* (2012) 373-398.

¹⁰⁸ Richard Rawlings, ‘Engaged Elites – Citizen Action and Institutional Attitudes in Commission Enforcement’, 6(1) *European Law Journal* (2000) 4-28 at 27.

to the administration.¹⁰⁹ Others emphasise how such a 'soft law' approach might endanger the rights and interests of individuals. They point out that the aim of legally binding rules is to protect individuals from the arbitrary behaviour of the administration;¹¹⁰ after all, '[m]uch of the activity of the public administration is so important that it should be based on law even when the direct interests of individuals are not at stake.' While public administration is to apply the law, it should still aim at efficiency.¹¹¹ Indeed, binding regulation and efficiency are not mutually exclusive: it is totally feasible to make laws that increase the efficiency of administration, were this deemed necessary, by enabling different means of steering administrative action.¹¹² To take an example, with regard to the Article 258 TFEU procedure the adoption of binding rights in a horizontal instrument would not need to limit the Commission discretion, but could focus on procedural matters such as time-limits and the duty to give reasons.¹¹³

Today, most comprehensive administrative rules and principles can be found in the internal documents of the institutions, in particular their Rules of Procedure, and in soft law documents. It is of course difficult for an external observer to evaluate how Commission officials, for example, experience that the existence of the 2001 Code of Good Administrative Behaviour has contributed to a positive change in the internal administrative culture of that particular EU institution. The Court has not proved willing to grant these Codes a very extensive interpretation. To my knowledge, there are no cases in which the Court made reference to the Commission's or the Ombudsman's Code on Good Administration. This supports the argument that 'soft law' cannot exist unless it is also legally binding.¹¹⁴ But, perhaps even more importantly, the choice of 'soft law' underlines the powers of the institution implementing it, since, in practice, it always has the final choice of either implementing the soft law norm or disregarding it.¹¹⁵ Similarly, soft law leaves the Court always in a position to decide what emphasis it might grant to the norm in a particular situation. Such a solution has been tried before with a rather modest outcome. Moreover, in the current constitutional framework, a soft law solution does not respect the character of good administration as a fundamental right.

It certainly is a problem, and must be treated as such, if elements of good administration are treated as 'optional' by the officials that are supposed to be implementing them. Alternatively, duties relating to good administration often seem to be treated as an

¹⁰⁹ For a discussion, see Outi Suviranta, 'Good Administration and Efficiency in Administration – Principles and Legislation' in Matti Niemivuo and Tuula Majuri (Eds.) *Outlooks on democratic Institutions in the Baltic Sea Region* (Helsinki 1999) 86-91 at 88.

¹¹⁰ *Ibid.*, 90.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Melanie Smith, 'Administrative procedures linked with Article 258 proceedings: an academic perspective', briefing note for the Committee on Legal Affairs at p 14.

¹¹⁴ For a discussion, see Jan Klabbers, *The Concept of Treaty in International Law*, (Kluwer Law International: The Hague, London and Boston, 1996) 156.

¹¹⁵ Päivi Leino, 'The Wind is in the North - The First European Ombudsman (1995-2003)', 10(2) *European Public Law* (2004) 333-368, 363.

additional requirement, distracting focus from 'real work'. In relation to openness, the Commission and the Council have tended to argue that it constitutes an administrative burden that is a threat to the 'interests of good administration'.¹¹⁶ For example, in the *TGI* case referred to above, the Commission expressed fears that the reviewing of aid would suffer if the competent services were forced to spend too much time dealing with applications for access: it cannot be the objective of Regulation No 1049/2001 to hinder the Commission in the performance of its 'real tasks'.¹¹⁷ Surprisingly, this sort of thinking has found some authoritative support in the Courts' case law as well.¹¹⁸ Good administration should not be understood as an additional requirement, but as a way of working, which is taken into account when planning working methods. When problems in the administration persist, its efficiency suffers. A proactive approach saves time, costs and burdens, when there is less need to examine complaints afterwards. Experiences from national contexts also demonstrate that the introduction of more detailed provisions of good administration need not entail additional costs for the administration or require additional resources.¹¹⁹ In fact, reform might even save money.¹²⁰ The main expense of the new Regulation might be limited to educating the staff in EU institutions to comply with its requirements. Such expense cannot be impossible to overcome.

The current European Ombudsman Nikiforos Diamandouros has continued to emphasise the added value of transforming the 2001 Code into a European law on good administration:

*This would help eliminate the confusion currently arising from the parallel existence of different codes for most EU institutions and bodies, would ensure that the institutions and bodies apply the same basic principles in their relations with citizens and would underline, for both citizens and officials, the importance of such principles.*¹²¹

It would seem that the introduction of a number of core principles of administrative law – most of them familiar from national contexts¹²² – and properly anchored in EU secondary legislation through a Regulation would benefit the citizen the most.

¹¹⁶ For a discussion, see Päivi Leino Case annotation, C-353/99 P, Council v. Heidi Hautala, 39(3) *Common Market Law Review* (2002) 621–632 at 631–632.

¹¹⁷ See the Opinion of Advocate General Kokott in Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, para 62.

¹¹⁸ See e.g. C-353/99 P *Council v Hautala and others* [2001] ECR I-9565, para 86; Case T-2/03, *Verein für Konsumenteninformation v Commission*, [2005] ECR, p. II-1121; paras 101–103.

¹¹⁹ For Finnish experiences, see the report by the Ministry of Justice to the Parliament on the implementation on the Law on Administration, Oikeusministeriön selvitys eduskunnan hallintovaliokunnalle hallintolain täytäntöönpanosta, MINS 11/2006 vp, Helsinki 2007, and the Parliament's Reply, HaVL 60/2006 vp.

¹²⁰ For Swedish experiences, see En ny förvaltningslag – A new Administrative Procedure Act; SOU 2010:29; Summary at 32.

¹²¹ Foreword to the Code by the European Ombudsman, page 9.

¹²² See Principles of Good Administration In the Member States of the European Union. Statskontoret 2005:4. See also Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, available at

The experiences from Regulation No 1049/2001 would also suggest that the adoption of legally binding rules is an effective way of influencing the everyday institutional practices: compared to the period before its adoption, a greater number of documents are now being released by the institutions, either automatically or following requests by citizens. Moving the matter outside the institution's own discretion also subjects the implementation of the rules and principles contained to external control – something that has so far been largely lacking with the exception of the soft law methods of control exercised by the European Ombudsman, which only have a limited impact on institutional attitudes.

Detailed rules of administrative procedure also safeguard the proper role of the courts in relation to administrative decisions. It is not the task of a court to take administrative decisions on behalf of the administration itself. Instead, the court should review that the law and the correct procedure have been followed, and that the administration has used its discretion within the margins allocated in legislation and for the right purpose. If this is not the case, then the matter is to be returned to the administrative body for a revised decision. But it is clear that such a function for the courts relies on the proper administrative procedures being in place, the observance of which the court can follow. In today's EU, the courts need to address claims going beyond such review – a function they have been reluctant to fulfil. From the perspective of individuals, the importance of securing that the correct procedural steps are appropriately taken care of is specifically increased by the fact that in the affected procedures Commission discretion is by definition wide.

4.2. Future prospects: a new article 298 regulation

Based on the previous arguments, it would seem rather clear that the current state of good administration is not satisfactory to guarantee the enjoyment of the right to good administration by Union institutions. A single general administrative law would be needed to provide a minimum safety net of guarantees to citizens – both private individuals and legal persons – in their interaction with the EU's administration – institutions, agencies, bodies and offices. This law should be limited to direct EU administration and be applicable, as *lex generalis*, to all areas of Union activity. Creating horizontally applicable minimum standards would not require a completely uniform administrative procedure to be applied across all EU policies, but would guarantee that the core rights and relevant procedural steps (e.g. the right to be heard, have access to one's file and to get a reasoned decision) are appropriately taken into account in all areas of Union action. Such codification would be necessary in particular when operating in a field where private individuals and companies do not currently enjoy strong procedural rights, for example in the different competition law procedures and the Article 258 TFEU procedure.

<https://wcd.coe.int/ViewDoc.jsp?id=1155877&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

More detailed provisions on the exercise and application of the guarantees laid down in the Article 258 TFEU Regulation could be given in sectoral legislation. Special legislation, applicable in a particular policy sector, could still be used when necessary to offer more detailed guidance while still guaranteeing the minimum level provided by the Article 298 Regulation. For example, current Regulation No 1049/2001 on public access to documents and Regulation No 45/2001 on the processing of personal data contain detailed rules of administrative process, applicable in all areas of Union action and would form *lex specialis* in relation to the future Article 298 Regulation. It is important to note that the Article 298 Regulation would always apply, unless another piece of legislation (*lex specialis*) provides otherwise. An official should not be able to decide on a case by case basis whether to apply a rule or not. This is one element of the requirement of lawfulness in administration, and has a direct bearing on the accountability of institutions. This sets requirements on finding the proper level of detail, and the correct balance between fundamental rights, on one hand, and the efficiency of administration, on the other.

The Regulation would be applicable to measures that have legal effects outside the administration. For this reason, an attempt would need to be made to define the various administrative functions of the institutions covered by the Regulation (e.g. administrative rule-making, administrative contracts). This is also something that has so far received limited attention in EU law. While the 2001 Code by the Ombudsman provides a good basis for further reflection, it predates the new provisions in the Treaty of Lisbon. Some relevant jurisprudence has also been given after its adoption, which might be taken into account – in one way or another – when adopting the new Regulation. In addition, keeping in mind the forthcoming accession of the EU to the European Convention on Human Rights, the requirements of the Convention and the relevant jurisprudence should also be carefully examined, for example as regards the availability of remedies and length of administrative proceedings.¹²³

The future Regulation should confirm a number of fundamental principles of good administration, such as the principle of equality and the principles of impartiality and independence, fairness and legitimate expectations, lawfulness and legal certainty; and the principles of proportionality and openness. Article 7 of the 2001 Code also refers to the absence of abuse of power. None of these principles are complete novelties, but their full implementation should be guaranteed at the level of secondary legislation, which should explain in a greater detail what the key elements of these principles are and when they are to apply. In addition, a reference to participatory democracy would need to enjoy a pivotal place in the future Regulation to emphasise the right of citizens to participate in decision-making. Many of these principles are already present in the Treaties and in the Charter, but further details about their implementation should be given in order to give them practical importance, and to provide a more balanced and comprehensive approach than in current case law.

¹²³ See e.g. Case of *Janosevic v. Sweden*, Application No. 34619/97, judgment of 23 July 2002; and Case of *Viljo Eskelinen and others v. Finland*, Application No. 63235/00, judgment of 19 April 2007, which both concern the acts of administrative authorities.

When introducing his Code in 2001, Jacob Söderman, the previous European Ombudsman, wished to place emphasis on the idea of service-mindedness, a principle that in national systems is often expressed as citizen-friendliness or as a concept of public service, implying that 'the administration exists to serve citizens, not vice versa.'¹²⁴ When comparing the Charter, case law, Article 298 TFEU and current secondary legislation, on one hand, and the 2001 Code, on the other, it is the 'service principle approach' that is most clearly lacking and where institutional attitudes might be in the most urgent need of improvement. The 2001 Code provides, for example, for separate provisions on legitimate expectations, consistency and advice (Article 10); courtesy (Article 12), and an obligation to transfer to the competent service (Article 15), all of which are significant elements of the principle. In addition to the more traditional principles of good administration, the service principle would need to be elaborated and gain a fundamental position in the context of this new Regulation, as one of its fundamental principles. The service principle, which is acknowledged at least in some of the Member States,¹²⁵ aims at guaranteeing a wider framework for guaranteeing both appropriate service and performing the tasks of the administration in a productive manner. The service principle implies, for example, that the institutions would need to provide the citizens necessary advice and respond to questions. Examples of situations that would be covered should also be given, such as the obligation to reply to messages, give some fundamental information about pending matters, and the obligation to transfer a matter to the competent service. At the same time it is clear that the duties relating to providing a good service always come with practical limitations as to how far the officials' duty to assist extends. For example, an official's duty to be helpful and provide information certainly does not entail a duty to do a researcher's job for him or her.

In addition to the general principles of good administration discussed above, standards relating to the handling of a specific matter should be included. Such provisions are the ones that are currently the most lacking or where the greatest divergences lay. These are also the matters that are present both in the complaints to the Ombudsman and in the Court's jurisprudence, where the Court has clearly required the legislature to lay down the relevant standards. In this respect, at least eight crucial elements can be distinguished.

First, the Regulation should contain a provision on the initiation of an administrative process so as to establish when a matter is pending. This would require some sort of registration of the case in acknowledging a letter or a complaint. In brief, the citizen has a right to know whether someone is dealing with his or her case, and for this reason, the institution should indicate contact information to the instance dealing with the matter. In this context, provision should be made of cases that are initiated by the institution itself

¹²⁴ Söderman, *supra* note 3.

¹²⁵ The principle is included in the relevant legislation e.g. in Finland, Sweden and Spain, but is also acknowledged as a principle e.g. in Portugal. For example, the Spanish legislation (30/1992) establishes in Article 3 (Principios generales) that 'Las Administraciones públicas, en sus relaciones, se rigen por el principio de cooperación y colaboración, y en su actuación por los criterios de eficiencia y servicio a los ciudadanos.' Available at http://noticias.juridicas.com/base_datos/Admin/l30-1992.t10.html - balloon1 .

and cases that are initiated based on petitions from individuals. In the same context, provisions concerning treatment of defective petitions should be provided, including a provision enabling citizens to complement their petitions in order to make sure that it is not ignored simply because it is incomplete. Moreover, it would need to be established how the date of arrival is established and how the matter is announced to the parties and the general public.

Second, the Regulation should include the obligation of an institution to examine and investigate a matter, familiar from case law, specifying that the institutions should clarify a matter adequately and appropriately in order to be able to decide on its merits. It could be considered whether this should be balanced with a reference to a party's obligation to contribute to the clarification of matters; in this case appropriate provision of one's privilege against self-incrimination¹²⁶ would perhaps need to be made.

Third, and quite importantly, the Regulation would need to lay down a general obligation of an institution to act within a reasonable time. It might be wise to leave the setting of specific time limits in individual procedures to sectoral legislation or the institutions' rules of procedure, which would entail a need to review and verify that applicable dead lines in other legislation are indeed 'reasonable'. It is evident that 'implied decisions' – in fact, no decision – are a common practice, which is extremely problematic for the citizens. Administrative silence should always end within a reasonable time – if not voluntarily, then there ought to be a mechanism in the Article 298 Regulation for making sure that the institution always acts. One option would be nominating a particular outside body to determine a time limit within which a decision is to be given.

Fourth, the obligation of an institution to hear a party before taking any individual measure that would affect him or her adversely (Article 41(2) CFR) should naturally be included, but it should be considered whether the provision ought to be wider and extend to those interested in the matter, in light of the requirements of participatory democracy. It is important to keep in mind that the duty of hearing does not mean that every possibly affected party must be reached and heard in each and every situation irrespective of whether they have something to say or not – which would indeed constitute an administrative burden – but that an opportunity is provided to give a statement to those who are interested in contributing. Specific rights for parties in a particular administrative process should also be introduced for more preferential treatment compared to individuals without a party status. Fifth, the obligation of the administration to state reasons for its decisions in writing is a 'must'; and in line with Article 41(2) of CFR, this obligation should extend to all decisions intended to have legal

¹²⁶ See Case 374/87 *ORKEM v Commission*, relating to an inquiry into the existence of agreements or concerted practices in the thermoplastics industry, where the Court established that 'the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove.' Para 35,

effects. Furthermore, provision ought to be made of the obligation to notify all persons concerned by a decision.¹²⁷

Sixth, the obligation to give an indication of remedies available to all persons concerned¹²⁸ would of course need to be included, while also making sure that effective remedies, in fact, exist, since 'rights are worth nothing without effective remedies'¹²⁹. The importance of remedies has also been underlined in case law, e .g. by the General Court in *max.mobil v the Commission*:

*Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.*¹³⁰

Seventh, as explained above, in the Ombudsman practice, many cases have also concerned instances of evident errors, which have in practice taken long to correct, due to the complexities of the applicable procedures. Against this background, provision should be made for review and correction by institutions of their own decisions, both on grounds or clerical errors but also on other grounds in certain specified cases.¹³¹ This possibility would create a smoother remedy to parties when compared with engaging the European Ombudsman or appealing to a Court.

Finally, a fundamentally important question relating to good administration, which is currently entirely unregulated at the level of legislation, is the obligation for the institution to keep registers and document administrative process.¹³² Open government is largely realised through the principle of documents being accessible to the public.¹³³ Even if transparency in legislative matters is of a pivotal importance, openness in purely

¹²⁷ See Article 20 European Code.

¹²⁸ Article 19 European Code.

¹²⁹ Söderman, *supra* note 3.

¹³⁰ T-54/99 *max.mobil v Commission*, para 57. Jurisprudence affects the question of what can be subject to an appeal, see e.g. Case C-362/08 P *Internationaler Hilfsfonds eV v the Commission*, para 52.

¹³¹ For example, the Finnish system of administrative remedies provides various alternative means for appealing an administrative decision. One of such means is the request for rectification by parties, which sometimes forms a precondition for formal appeal. It is a rather quick and flexible way of requesting the authority to re-examine its administrative decision. The public authority that has made the decision can following such a request amend its decision, annul it or reject the request. The possibility of using a request for rectification is regulated in special legislation. The Administration Act provides a procedure for the use of the request. A similar provision is planned in Sweden, see *En ny förvaltningslag – A new Administrative Procedure Act*; SOU 2010:29; Summary at 30-31.

¹³² See Article 24 European Code.

¹³³ The Ombudsman Code from 2001 includes, in addition to provisions on public access to documents, also a separate provision on the need to provide clear and understandable information and to assist in finding it (Article 22).

administrative contexts also serves a significant function. As the preamble of Regulation No 1049/2001 establishes,

[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

The importance of openness in the administrative activities of the institutions has been recently highlighted by the Court of Justice, which clearly rejected a claim by the Commission downplaying its role in administrative contexts.¹³⁴ The legislature would however do no harm in reminding of the connection in the context of the Article 298 Regulation. An obligation to register document administrative process would be necessary since the rules on public access do not currently include an obligation for the institutions to register their documents, and no such obligation has been proposed by the Commission in the context of the on-going review. The Commission has, however, proposed to link public access to whether a document has been registered by the institution or not.¹³⁵ In order to limit institutional discretion in this regard and thus *de facto* public access, an obligation to register and document administrative processes would need urgently to be introduced. It is a central tool in guaranteeing the openness of administration and that documents are, in fact, accessible for the general public, but also a way of easing the burden of institutions in identifying the requested documents.

¹³⁴ In Case C-506/08 P, *Sweden v MyTravel and Commission*, ruling of 21 July 2011, para 109.

¹³⁵ See Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM(2008) 229 final, Article 3(a).

5. Towards a conclusion: on openness, legitimacy and enhanced citizen involvement

Key findings

- Proper standards of administration result in less bureaucracy and litigation.
- The appropriateness and fairness of administration plays a central role in ensuring trust in EU administration.

Article 298 TFEU sets a number of requirements to good administration: Union administration is to be open, efficient and independent. Openness is clearly one of the fundamentals: Acts of the administration need to be open so as to enable scrutiny and participation.¹³⁶ For many, good administration is essentially open administration; this is a system that

*'allows the citizen to obtain the information needed to call the administration to account for its actions and omissions, and so promotes a high level of public debate and enhances the possibilities of rational consent and participation. Furthermore openness seems to work against corruption, while a closed and confidential handling of public affairs provides opportunities for fraud and other illegal activities.'*¹³⁷

The background vision – which it is easy to subscribe to – is that openness improves the quality and legitimacy of administration.¹³⁸

But efficiency is also of a pivotal importance. As Advocate General Jacobs once famously put it, 'slow administration is bad administration'.¹³⁹ In order to be good, public administration must also be efficient. But at the same time, its structure and methods are to be constructed so that the democratic legitimacy and the protection of individuals in their relation to the administration are respected.¹⁴⁰ Similarly, openness improves the independence of governance. If governance is good, this results also in efficient governance; and when governance is bad, problems emerge, also hindering the administration from operating efficiently. Excessive bureaucracy is the antithesis of good administration. In this respect, proper regulation of the administration and the relevant standards contribute to less bureaucracy and less litigation. Clear rules result in less time

¹³⁶ Mäenpää, *supra* note 18, 469.

¹³⁷ Söderman, *supra* note 3.

¹³⁸ For a number of thoughtful contributions on the theme, see Christopher Hood & David Heald (Eds.), *Transparency. The Key to Better Governance?* (The British Academy and Oxford University Press: 2006).

¹³⁹ Opinion of AG Jacobs in *Z v Parliament*, [2001] ECR I-9197.

¹⁴⁰ Suviranta, *supra* note 109, 90.

being spent fighting in court. If there is trust that the administration functions properly – ‘fairly, impartially, and within a reasonable time’ – then there will be less complaints and less reason to ask for a review of decisions. Good administration is also responsive to the wishes of the governed. Good and efficient administration is not about trying to secure one’s power at any cost – something that the Council and the Commission tend to forget in appealing far too many of the General Court rulings where they lose against private individuals.¹⁴¹

Especially since the entry into force of the Treaty of Lisbon, and the new emphasis given in the new Treaty framework to fundamental rights and citizen involvement, the importance of considerations relating to the legitimacy of the system of governance have gained particular importance. In this new framework, the future Regulation on good administration has been given an ambitious task. It is believed that there is a linkage between a properly functioning administrative law and the legitimacy of democratic systems.¹⁴² Would the new Article 298 Regulation actually contribute to strengthening the legitimacy of the Union?

There are certain difficulties involved in the attempt to measure legitimacy, since the concept has no well-established meaning. ‘Legitimacy’, as Koskenniemi has shown, is ideally suited to justify anything because it has no clear reference: it forms an ‘intermediate concept whose very imprecision makes it available to avoid the attacks routinely mounted against the formal (but too abstract) idea of legal validity and the substantive (but too controversial) notion of justness’.¹⁴³ At the same time, legitimacy falls short of both validity and justness.¹⁴⁴ It may mean that the institution is actually accepted (as a fact) by the relevant community (empirical or social legitimacy), that it does ‘good’ (moral legitimacy) or that it functions in accordance with law (formal or normative legitimacy, i.e. legal validity).¹⁴⁵

¹⁴¹ For example, the recently concluded *Bavarian Lager* saga is hardly an example of good, responsive administration: the Commission spent 14 years arguing, against the advice of both the European Ombudsman and the European Data Supervisor, and even appealing the case to the CJEU, about access to five names in a meeting protocol with a company that had reasonably solid grounds for having access to them. Case C-28/08 P, *Commission v Bavarian Lager*.

¹⁴² Working document. State of play and future prospects for EU administrative law. To be submitted to the Committee on Legal Affairs by the Working Group on EU Administrative Law. 19 October 2011, Recommendation 9. See also Clapham who sees rights as resulting in an intense ‘contract’ or relationship with the right giver and suggests that the Community could expect some increased loyalty from its citizens if it would realise its role in distributing rights. Andrew Clapham, ‘A Human Rights Policy for the European Community’, 10 *Yearbook of European Law* (1990) 310-366, at 311.

¹⁴³ Martti Koskenniemi, ‘Book review of the Power of Legitimacy Among Nations by Thomas N. Franck’, 86 *American Journal of International Law* (1992) 175-178, at 175.

¹⁴⁴ *Ibid.*, at 178.

¹⁴⁵ See, e.g., Kaarlo Tuori, ‘Legitimacy’, in *The Philosophy of Law: An Encyclopedia* (Garland Publishing: New York and London, 1999) 493-495; J.H.H. Weiler, ‘The Transformation of Europe’, 100 *The Yale Law Journal* (1991) 2403-2483, at 2469; Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) at 24.

Even if one could argue that the EU enjoys sufficient empirical legitimacy (i.e. acceptance by community) through its pre-established (even if complicated) legislative procedures, its claim for normative legitimacy is a weak one. The situation is little helped by the repeated episodes of corruption, mismanagement of funds and a general administrative environment of secrecy, which meets new moves towards openness with caution and challenges them on the basis of avoidance of administrative burden. According to De Búrca, the reality may be that, despite 'many years of high-sounding Treaty preambles and general declarations about peace and prosperity, the legitimacy and relevance of the European Union as a polity is not felt by large sections of the public'. This is because much of the Union law affecting peoples' lives seems either trivial or irritating, or is perhaps important, but at 'such a level of remoteness that there seems little prospect of any influence over the policy and little understanding of why it ought to be decided at a European rather than at any other level.'¹⁴⁶ The idea of rights as a tool of legitimacy is a widely used one, and is based on the idea of the rights claim being 'more than just a claim about what is politically and morally best'.¹⁴⁷ But if human rights were valid and useful only so as to buttress legitimacy, they would be instrumental and no longer 'trumps', as Dworkin argues in his well-known thesis.¹⁴⁸

This being said, and thus taking a certain distance from 'legitimacy' as a concept, it can certainly be argued that the Article 298 Regulation would have clear practical benefits from the point of view of citizens, who currently feel a considerable degree of distrust in the EU and its institutions. The Eurobarometers, the Commission tool for monitoring the evolution of public opinion in the Member States, evidence that such trust has never been overwhelming among the citizens. The latest one (December 2011) shows a clear further erosion in citizens' trust. In today's Europe, one would think that European decision-makers would hurry to do what they can to increase such trust. This is essentially where the discussion on good administration would have vast potential. But unfortunately, the Commission seems to be in no hurry. In an answer given by Mr Barroso, President of the Commission, to a written question by Ms Anneli Jäätteenmäki, MEP, he argued:

Article 298 of the TFEU provides the legal basis for a regulation that would cover all EU institutions, bodies and offices, if needed. Before having recourse to a new legal arrangement, the Commission would wish to examine the existing instruments and case law at EU-level and practices in the Member States to see if any further steps are needed. The Commission does not have a specific timetable for making a proposal. It considers that Article 298 provides a possibility, not an obligation. The Commission recalls that the EU institutions are bound by Article 41 of the European Charter of Fundamental Rights.¹⁴⁹

¹⁴⁶ Gráinne de Búrca, 'The Quest for Legitimacy in the European Union', 59(3) *Modern Law Review*(1996) 349-376 at 374-375.

¹⁴⁷ Duncan Kennedy, *A Critique of Adjudication [fin de siècle]* (Harvard University Press: Cambridge Mass., 1998) at 332.

¹⁴⁸ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press: Cambridge Mass., 1977) for example at xi.

¹⁴⁹ Parliamentary questions 17 January 2012, E-011125/2011.

Keeping in mind that Article 298 TFEU has been in its current format since the negotiations on the Constitutional Treaty were concluded in 2004, one would think that the Commission would already have had time to conduct such an examination, if its heart was set to it. Before and after 2004, various studies on the possible need for a new Regulation have been conducted by other actors, pointing at the urgency of better regulation of Union administration – especially that within the Commission services. Therefore, it would seem that the Commission reply is seriously out-dated: we should no longer be discussing whether rules would be needed, but should have moved to debating the substance and ambition of these rules in order to do what we can to deliver better quality administration of Union affairs.

The point of good administration is to ensure that citizens experience that their matters are handled properly. This is a key element behind the wish to create legitimacy for the Union, as well, and to fulfil the promise given in the Charter preamble of the Union placing ‘the individual at the heart of its activities’. This objective would require a rather fundamental review of the understanding of the role of citizens, as correctly underlined by the JURI Committee in its Report:

[C]itizens should not be viewed as mere passive receivers of administrative decisions but rather should be called upon to actively participate in the exercise of public power.¹⁵⁰

While the discussion on legitimacy remains theoretical and has limited practical contribution, a Regulation on 298 TFEU is a project with practical effects. It results in better quality administration that delivers results more efficiently. This has clear benefits for the citizens, but equal benefits for the administration. As such, it is a win-win scenario.

¹⁵⁰ JURI report, Recommendation 3.

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**Aspects Relating to Added Value for
Citizens and Economic Operators**

**Research paper
by Prof. Jacques Ziller**

Abstract

A general Law of Administrative Procedure for the EU, based on Article 298 TFEU, and limited to the direct institutions, bodies, offices and agencies, of the Union would help to establish a single set of easily identifiable and comprehensible rules and standards that could increase guarantees for citizens, economic operators, NGOs and other legal persons across the board.

AUTHOR

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List of abbreviations

Charter	Charter of Fundamental Rights of the European Union
Citizens etc.	Citizens, economic operators, NGOs and other legal persons
DG	Directorate General
ECJ	Court of Justice of the European Union
EEA	European Environmental Agency
EU	European Union
EU	EU Institutions, Bodies, Offices and Agencies institutions etc.
EDPS	<i>European Data Protection Supervisor</i>
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
MEP	Member of the European Parliament
NGO	Non governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHIM	Office of Harmonization for the Internal Market
OJ	Official Journal - of the European Communities (until 28/02/2003); - of the European Union (since 1/03/2003)
OLAF	European Anti-Fraud Office
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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Executive summary

Background

On 26 March 2012, the *Committee on Legal Affairs* of the European Parliament requested a European Added Value Assessment to support work on the legislative initiative report on an *EU Law of Administrative Procedure of the EU* which was being prepared by the Committee. This project was intended to build on the work carried out by the Working Group on Administrative Procedure, established by the *Legal Affairs Committee*, the findings of which are summarised in the Working Document entitled "*State of Play and Future Prospects for EU Administrative Law*".

The *Working Group* concluded that, while citizens are increasingly directly faced with the Union's administration, they do not possess the corresponding procedural rights, which they could use in case of litigation. Furthermore it points to the need for a single general administrative law, based on Article 298 TFEU, binding on the Union's institutions, bodies, offices and agencies and focusing on administrative procedure as a 'lex generalis', in order to provide a minimum safety net of guarantees for citizens in their interaction with the EU's administration.

The European Commission has not yet indicated any intention to come forward with a proposal on this issue. In its legislative initiative report on the matter, the Legal Affairs Committee calls for such a proposal.

Aim

The aim of the present Assessment Note is to assess the potential European Added Value for citizens and economic operators of the introduction of a general Law of Administrative Procedure for the EU, based on Article 298 TFEU, and limited to the direct administration of the Union.

Administrative Procedure for the EU, based on Article 298 TFEU, and limited to the direct administration of the Union. In addressing the issues identified by the *Working Group on Administrative Procedure*, this Assessment Note is based on its recommendations with regard to the modalities of a European legislative intervention on the basis of Art. 298 TFEU. The way forward suggested by the *Working Group* is that of innovative codification in the form of a general law applying across the board to all areas of Union activity, filling gaps in the system with rules applicable by default and thus providing citizens with a minimum safety net of guarantees. Priority should therefore be given to horizontal, innovative codification, laying down general principles for EU administrative procedure.

The Assessment Note contrasts the potential effects of an *EU Law on Administrative Procedure* with the consequences of non-action. Other options are examined where relevant.

General information

Key findings

- Taking the *European Code of Good Administrative Behaviour* as a starting point for an analysis of the status quo, it appears that, whereas most of its provisions correspond to clauses embedded in the EU Treaties and Charter of fundamental rights, or in secondary EU legislation, the wording of binding law provisions lacks the clarity and precision of the corresponding articles of the *Code*, which are not legally binding. There are lacunae in the existing set of legal principles, rights and rules that apply to EU administrative procedure. Some of the provisions of the *Code* are not matched by corresponding binding law clauses. Some other guarantees and standards of EU administrative procedure are set up only in EU documents or measures that have no binding force. A comparison with Member State's laws on administrative procedure also indicates that there are further principles, rights and rules which are absent in EU law, non-binding measures or documents.
- Very few EU regulations embed principles, rights and rules of administrative procedure that apply across the board to all EU policy sectors and to all EU institutions, bodies, offices and agencies. Subject specific or sector specific regulations and practices on administrative procedure differ from one case to another. Not all differences are the indispensable consequence of objective differences from sector to sector. In some sectors there is clearly a lack of regulations and established practices guaranteeing the rights of citizens, economic actors and other legal persons.
- One important and underestimated issue is the availability of non-binding codes and documents in all EU languages.
- The instrument of an EU regulation based on Article 298 TFEU offers a series of advantages for the wording of rules, both precise enough for legal purposes and written in a user-friendly language: it must be published in all language versions, with the benefit of the involvement of lawyer-linguists; the involvement of MEPs in the ordinary legislative procedure offers a unique opportunity to check the closeness to the citizen and user-friendly character of such a regulation; and far from being an impediment to flexibility, a formal regulation is adopted through mechanisms that should guarantee provisions being built into it, in order to keep it flexible to the necessary degree.
- This instrument would help to establish a single easily identifiable and comprehensible set of rules and standards, that could increase guarantees for citizens, economic operators, NGOs and other legal persons across the board; that includes, amongst others, two main sectors where there are still some

unresolved problems such as the infringement procedure of Art. 258 TFEU, and the administrative procedures applied by OLAF in its investigations.

- Such an instrument would make it possible to fill gaps and lacunae in the current set of rules and standards applying to EU administrative procedures. Four examples may better illustrate how an *EU Law of Administrative Procedure* could operate in this respect, i.e. on the issues of time limits for decisions, of cooperation between administrative authorities, of contracts and other agreements, as well as that of participation rights.
- Such an instrument could provide for more coherence, in order to avoid the disorientation which will inevitably be felt by citizens, economic operators etc. who have to deal with different offices or agencies – or even with different institutions and bodies – due to their own different activities. The example of acknowledgement of receipt is probably one of the best in this respect. Furthermore, such an instrument would become a template for further elaboration in new subject specific or sector specific regulations or new offices' or agencies' internal regulations and would foster more homogeneity in the presentation and wording of principles, rights and rules of administrative procedure.
- Only a binding instrument would be mandatory for everyone – i.e. EU officials as well as citizens, economic operators, etc., as well as courts, and thus have the capacity to establish rights for citizens etc.. This instrument may be the basis for a claim in court, and non-compliance with it may lead to sanctions decided by a judge. In the multicultural context of the European Union, the binding character of law gives a higher profile to an instrument of this kind in the minds of officials, citizens etc. coming from most of the Member States. Taken as a whole, it would lead to a series of positive consequences, which will be illustrated in this Note with the example of the duty to indicate remedies.
- Experience in State public administration demonstrates that it is not the binding character of a law of administrative procedure as such which may generate negative consequences, but the wording of the relevant provisions, and the general approach to the implementation of such a law.
- At present, EU law has an influence on the administrative procedures in Member States only through a number of subject specific or sector specific directives or regulations which establish special procedures, and through the case-law of the ECJ that established the principles limiting the 'procedural autonomy' of Member States. A regulation establishing an EU Law on Administrative Procedure would not change the state of the art in this respect.
- An EU Law on Administrative Procedure based upon art. 298 TFEU would only apply to EU institutions, bodies, offices and agencies carrying out direct administration or involved in composite procedures. The principles of conferral

and of subsidiarity would therefore be fully complied with. If well worded, such an instrument might considerably improve the position of citizens etc. in composite procedures, which may be defined as procedures in which a final decision of EU institutions etc. are based upon a preparatory activity undertaken by Member States' authorities, or vice-versa.

- A spill-over effect in the field of administrative procedure has been experienced since the adoption in September 2000 of the *European Code of Good Administrative Behaviour*, which has become a model for some non-binding codes and even sometimes part of new laws and regulations on administrative procedure adopted on a purely voluntary basis by some Member States, candidate States and beyond. The same might happen with an EU Law on Administrative Procedure, and this would highlight the positive role the EU plays in developing the rights of citizens, economic operators, NGOs and other legal persons.

1. Principles, rights and rules of EU administrative procedure: the status quo

Key findings

- In what ways could an *EU Law of Administrative Procedure* ensure a more effective protection of citizens' and economic operators' rights in their dealings with EU administration? Answering this question involves recalling the status quo of principles, rights and rules relating to administrative procedure under present day EU law.
- Taking the *European Code of Good Administrative Behaviour* as a starting point, it appears that, whereas most of its provisions correspond to clauses embedded in the EU Treaties and Charter of Fundamental Rights, or in secondary EU legislation, the wording of binding law provisions lacks the clarity and precision of the corresponding articles of the *Code*, which are not legally binding.
- There are lacunae in the existing set of legal principles, rights and rules that apply to EU administrative procedure. Some of the provisions of the *Code* are not matched by corresponding binding law clauses. Some other guarantees and standards of EU administrative procedure are set up only in EU documents or measures that have no binding force. A comparison with Member State's laws on administrative procedure indicates that there are further principles, rights and rules which are absent in EU law, non-binding measures or documents.
- Only a few EU regulations embed principles, rights and rules of administrative procedure that apply across the board to all EU policy sectors and to all EU institutions, bodies, offices and agencies.
- Subject-specific or sector-specific regulations and practices on administrative procedure differ from one case to another. Not all differences are the indispensable consequence of objective differences from sector to sector. In some sectors there is clearly a lack of regulations and established practices guaranteeing the rights of citizens, economic actors and other legal persons.
- One important, underestimated issue is the availability of non-binding codes and documents in all EU languages.

1.1 Existing principles, rights and rules of EU administrative procedure and their expression in binding law

It is often stated that there are already many - perhaps even too many - EU regulations, measures, or documents which state principles, rights and rules of administrative procedure. Examining the status quo demonstrates on the contrary that not all articles of the *European Code of good administrative behaviour* are matched by a corresponding clause in EU law, and that there are other EU principles, rights and rules of administrative procedure which are not included in the *Code*.

1.1.1. The European Code of Good Administrative Behaviour compared to binding provisions of EU law

In order to have a clear view about the status quo, the most appropriate starting point is the *European Code of Good Administrative Behaviour* (hereafter *European Code*), which has been adopted by the European Parliament in September 2001.¹ There are other comparable documents, such as the *Code of good administrative behaviour for staff of the European Commission in their relations with the public*² and the *Code of good administrative behaviour for the General Secretariat of the Council and its staff*.³ However, the *European Code* is the only document on administrative procedure that applies as a matter of principle to all EU institutions, bodies, offices and agencies (hereafter 'EU institutions etc.') and across the board to all EU policy sectors. The *European Code* has been drafted by the *European Ombudsman* in a clear language in order to be directly applicable by EU officials.

The rights, rules, principles and standards that are written down in the *European Code* are used by the *European Ombudsman* in examining maladministration in the functioning of EU institutions etc., which includes checking if the right to good administration, guaranteed by Art. 41 of the EU Charter of fundamental rights, has been fully complied with. Art. 41 has been drafted in a very general way and clearly needs complementary documents to flesh it out and to make its content fully comprehensible to citizens, economic operators, NGOs and other legal persons (hereafter citizens etc.).

¹ The Code is available in all 23 official languages of the EU as well as in three languages of candidate States at <http://www.ombudsman.europa.eu/resources/code.faces> (last checked on 10/07/2012).

² Available at http://ec.europa.eu/transparency/civil_society/code/index_en.htm (last checked on 10/07/2012).

³ *Council Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public*, OJ, C 189, p. 1.

Article 41 Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The official *Explanations to the Charter*⁴ give indications as to the case law of the European Court of Justice (ECJ) that is reflected by the content of Art. 41. For instance, in its ruling of 18 September 1995, *Detlef Nölle v Council* Case T-167/94 – about an anti-dumping measure – the Court of First Instance stated that “*Where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative proceedings is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, and the right of the person concerned to make his views known and to have an adequately reasoned decision*”. That ruling has been further developed in other rulings, also by the ECJ itself, for instance in its Judgment of 21 November 1991 *Technische Universität München* Case C-269/90 where the Court explained that the principle of good administration would have required the group of experts whose opinion the Commission followed to have been appropriately composed, the applicant for exemption to have been given an opportunity to make its views known on the relevant circumstances and, where necessary, on the documents taken into account by the Commission and the statement of reasons for the decision finally adopted not to have merely reproduced the reasoning for a previous decision. In its ruling of 9 July 1999 *New Europe Consulting v. Commission* Case T-231/97 – about projects of the PHARE programme for aid to countries in transition – “*even if the legislation applicable does not give tenderers the right to be heard by the Commission before it takes steps to ensure that the resources for PHARE projects are economically managed, it is settled case-law that respect for the rights of the defence in any proceeding initiated against a person and liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceeding in question*”.

The *Explanations* also make reference to Art. 47 of the Charter, on the right to an effective remedy and to a fair trial; those explanations are useful for persons with a good legal education, but certainly not clear enough to be understood by non-expert officials and ordinary citizens.

⁴ OJ C 303, 14.12.2007 p. 17.

Further to Art. 41, other provisions of the *Charter* are relevant to administrative procedure, namely articles 42 on the right of access to documents, 43 on the *European Ombudsman*, 46 on diplomatic and consular protection, 47 on the right to an effective remedy and to a fair trial, as well as more general provisions such as articles 1 on human dignity, 8 on the protection of personal data, 20 on equality before the law, and 21 on non-discrimination. Some provisions of the Charter are more relevant to the relationship between EU institutions etc. and their staff.⁵ In addition, a number of other Treaty provisions establish the principles, rights or rules of administrative procedure. Some of these Charter and Treaty provisions have been fleshed out by a corresponding legally binding text – usually a EU regulation – such as Regulation 1/58 on official and working languages, Regulation 45/2001 on data protection and Regulation 1049/2001 on access to documents, as well as the EU Staff regulations and the EU Financial regulation.⁶ There is however no legally binding text of the kind that fleshes out Art. 41 of the *Charter*; the non-binding *European Code* is what comes closest to such a text, albeit not having a binding character.

In order to compare provisions of the *European Code* with existing provisions of EU binding law, a first step is to establish whether there are provisions of EU law in the Charter and Treaties corresponding to the core of each of the articles of the *European Code*. The Charter and Treaty provisions normally apply to all institutions etc. and across the board to all policy sectors, unless otherwise specified in the provision itself. In the absence of a general EU Law on Administrative Procedure, and for aspects that are not covered by the existing regulations on access to document, data protection, finances, languages, and staff regulations, those Charter and Treaty provisions are the only ones which are generally applicable.

In a second step, the wording of the relevant articles in the *European Code* should be compared with the wording of the corresponding provisions of binding law. The concept of binding law – as opposed to so-called ‘soft law’ – means in a nutshell that a given provision establishes a right for individuals or legal persons (economic operators, NGOs, etc.) and that if officials do not implement the relevant provisions correctly, the possibility of eventually referring to the ECJ is available. Not only soft law instruments of EU are relevant for the issues of administrative procedure. There is also a Recommendation by the Committee of Ministers of the Council of Europe to Member States on good administration, adopted on 20 June 2007, which contains many of the rules that are present in the *European Code*, and also a number of more general principles relevant to administrative procedure. The added value of binding law will be discussed in Chapter 2, section 2.2 of the present Assessment Note.

⁵ Articles 23 on equality between men and women, 27 on workers' right to information and consultation within the undertaking, 28 on right of collective bargaining and action, 30 on protection in the event of unjustified dismissal, 31 on fair and just working conditions, 33 on Family and professional life, and 34 on social security and social assistance.

⁶ References to all those regulations are provided at the end of this Assessment Note.

- Correspondence between the core of the *European Code's* articles and existing provisions of the Charter and Treaties appears in Table 1. Each article of the *Code* is recorded by its title; articles which do not recall a principle, rule or right applicable to administrative procedure are omitted (i.e. articles 1 on 'General provisions'; 2 and 3 on the 'Scope of application' of the Code; 25 on 'Publicity for the Code' and 27 on 'Review of operation').
- The corresponding provisions of EU law are indicated by the relevant article number of the TEU, TFEU or Charter, or by the indication 'ECJ case law' when the corresponding principle, right or rule, albeit not mentioned in the Treaties or the Charter is applicable as binding law due to rulings of the ECJ. Indeed, ECJ rulings that interpret the Charter and Treaties often establish general principles that are applicable across the board in the absence of any implementing regulation. The case law that is established in that way has the same binding character as Charter or Treaty provisions.
- A brief comment is added, in order to indicate to what extent the EU law provision corresponds to the relevant article of the *European Code*. It must be recalled that most of the mentioned Treaty provisions were not drafted for the specific purpose of their application in EU administrative procedure, but with a much broader scope; exceptions are Art. 41 Charter and Art. 298 (1) TFEU. More general comments and some more precise examples are given after the table.

Table 1: Procedural rights in the European Code of Good Administrative Behaviour and in EU binding law

Articles of the European Code	Binding EU Law	Comments
4. Principle of lawfulness	Art. 2 TEU	<i>Less precise</i>
5. Absence of discrimination	Art. 9 TEU	<i>Less precise</i>
6. Proportionality	Art. 5 (4) TEU	<i>Less precise</i>
7. Absence of abuse of power	Art. 263 3rd indent TFEU	<i>Less precise</i>
8. Impartiality and independence	Art. 41 (1) Charter 298 (1) TFEU	<i>Less precise, less comprehensive</i>
9. Objectivity	Art. 298 (1) TFEU	<i>Less precise</i>
10. Legitimate expectations, consistency and advice	ECJ case-law (on legitimate expectations)	<i>Less comprehensive</i>
11. Fairness	Art. 41 (1) Charter	<i>Equivalent</i>

12. Courtesy	No	<i>Absent: not a legal principle or rule</i>
13. Reply to letters in the language of the citizen	Art. 41 (4) Charter and 24 TFEU	<i>Equivalent</i>
14. Acknowledgement of receipt and indication of the competent official	No	<i>Absent</i>
15. Obligation to transfer to the competent service of the Institution	No	<i>Absent</i>
16. Right to be heard and to make statements	Art. 41 (2) b Charter	<i>Less precise</i>
17. Reasonable time-limit for taking decisions	Art. 41 (1) Charter	<i>Less precise</i>
18. Duty to state the grounds of decisions	Art. 41 (2) c Charter; Art. 296 TFUE	<i>Less precise</i>
19. Indication of the possibilities of appeal	No	<i>No general binding law</i>
20. Notification of the decision	Art. 297 TFUE	<i>Less comprehensive</i>
21. Data protection	Art. 8 Charter; Art. 16 (1) TFEU	<i>Equivalent</i>
22. Requests for information	No	<i>Absent</i>
23. Requests for public access to documents	Art. 42 Charter; Art. 15 (3) TFEU	<i>Equivalent</i>
24. Keeping of adequate records	No	<i>Absent</i>
26. Right to complain to the <i>European Ombudsman</i>	Art. 43 Charter; Art. 20 (2) d TFUE; 228 TFUE	<i>Equivalent</i>

Source: Compiled by the Author of the present Assessment Note

Table 1 shows that a number of principles, rights and rules of EU Administrative Procedure expressed in the *European Code* are not matched by provisions of the EU Treaties and Charter.

The *European Code's* articles on 'Courtesy' and, to a lesser extent, on 'Requests for information' and 'Keeping adequate records' may be understood as guidelines of behavior, which do not necessarily generate a corresponding right of citizens and economic operators, or obligations sanctioned by law for the institutions, bodies, offices and agencies of the Union. Otherwise, the articles on 'Acknowledgement of receipt and indication of the competent official', 'Obligation to transfer to the competent service of

the Institution' and 'Indication of the possibilities of appeal' clearly correspond to rights or obligations, as demonstrated by the fact that they are part of many Member State's laws on administrative procedure, as well as of some subject specific or subject specific or sector specific EU regulations. The *European Code's* article on 'Legitimate expectations, consistency and advice' is not matched by any Treaty or Charter provision; the relevant case law of the ECJ overlaps only to a limited extent with the content of the *Code*.

As will be further explained in section 1.2, the wording of existing Treaty and Charter provisions is in most cases not similar to the content of corresponding articles of the *Code*, which are far more focused on administrative procedure and usually more precise than Treaty or Charter provisions. Only a limited number of articles of the *European Code* are matched by similar content of the relevant Treaty or Charter clauses: i.e. the articles on 'Fairness', 'Reply to letters in the language of the citizen', 'Data protection and' Requests for public access to documents'. It may be noted that the three latter sets of provisions are a synthesis of existing EU regulations, i.e. Regulation 1/58 on official and working languages, Regulation 45/2001 on data protection and Regulation 1049/2001 on access to documents; the general principles of those regulations have been taken over in the Treaties and Charter in the occasions of treaty revisions from the Treaty of Maastricht of 1992 onwards.

1.1.2. Other EU principles, rights and rules of EU administrative procedure identified by the Working Group on EU Administrative Law of the European Parliament's Committee on Legal Affairs

The *Working Group on EU Administrative Law*, in preparing its recommendations to the European Parliament's *Committee on Legal Affairs*, identified «*General principles and rights contained in primary law and case law*»,⁷ as well as «*administrative innovations*» under the headings of «*Public consultation*» and «*Lobbying and the transparency register*». In order to give a full account of the status quo, those general principles and rights make it possible to draw up a list of principles, rights and rules complementary to those addressed by the *European Code*. These are: rights and principles guaranteed by provisions of the EU Charter on the right to good administration and the right to an effective remedy or by Treaty clauses on Court remedies that are closely connected to the latter; obligations that the Treaties impose upon institutions (such as the publication of legal acts and some forms of consultation); general principles applicable to the institutions such as participation closeness to the citizen or effectiveness; as well as the institutional practice of the Lobbying and Transparency Register.

Most of the corresponding EU law provisions are drafted in a way that is either less precise or less focused on administrative procedure than articles of the *European Code*, or drafted in a very technical legal language. Some specific examples will be discussed under section 1.2.

⁷ *Working Document - State Of Play And Future Prospects For EU Administrative Law, submitted to the Committee on Legal Affairs by the Working Group on EU Administrative Law, 19 October 2011, p. 11-12.*

Table 2: Other Procedural Rights in EU Binding Law

Other EU Principles, Rights and Rules	Binding EU Law	Comments
Right of access to file	Art. 41 (2) b Charter	<i>Less precise</i>
Right to reparation	Art. 41 (3) Charter; Art. 340 TFUE	<i>Less precise</i>
Right to an effective Remedy	Art. 47 Charter	<i>Less precise</i>
Right to legal aid	Art. 47 Charter	<i>Less precise</i>
Right to call an institution to act	Art. 265 TFUE	<i>Technical legal language</i>
Right to apply for annulment of an administrative decision	Art. 263 TFEU	<i>Technical legal language</i>
Publication of legal acts	Art. 297 TFEU	<i>Technical legal language</i>
Public consultation	Protocol n. 2 on principles of subsidiarity and proportionality	<i>Less focused on administrative procedure</i>
Participation	Art. 10 (3) TEU	<i>Less precise</i>
Closeness or Proximity	Art. 10 (3) TFEU	<i>Less precise</i>
Effectiveness	Art. 298 TFEU	<i>Less precise</i>
Lobbying and Transparency Register	No	<i>No legal provision</i>

Source: Compiled by the Author of the present Assessment Note

It has to be added that, as explained by the *Working Group*,⁸ there are a number of sectors in which more detailed binding regulations or administrative practices have been developed, which further elaborate upon the principles, rights and rules which are being identified in this paragraph of the Note and the previous one (1.1.1.).

Four of those subject specific regulations theoretically apply across all EU policy sectors and to all EU institutions etc., namely regulation 1049/2001 on access to documents, regulation 45/2001 on data protection, staff regulations and the financial regulation 1605/2002 and its implementing Regulation 2342/2002. While the purpose of the two first regulations is to set up guarantees for citizens etc, and while the purpose of the third one is both to ensure the effectiveness of EU administration and set up guarantees for EU officials and agents (or candidates to such offices, all of which are also citizens), the purpose of the financial regulation is only the protection of the financial interests of

⁸*Working Document*, quoted above in footnote 6, p. 15 ff.

the Union, and not to set up guarantees for citizens etc. One might also add to the list of table 2 Regulation 1182/71 of 3 June 1971 determining the rules applicable to the calculation periods, dates and time limits for acts of the Commission and Council.

Other regulations and practices exist, that are specific to a policy sector, especially in the fields of competition rules, state aids and trade policy; they cannot be applied to other policy sectors if there is no specific legal provision to that effect and in any case, many of their clauses would need to be drafted differently in order to be applied to a different policy context.

1.2 The wording of existing principles, rights and rules of EU administrative procedure

There are important differences in the wording of existing principles, rights and rules of EU administrative procedure whether they are established in the Charter and Treaties, in EU secondary legislation (regulations), in ECJ rulings and in the *European Code* or other non-binding instruments. Most of those differences have important consequences.

Before going into more details, it must be recalled that all those binding law provisions, as well as the articles of the *European Code*, exist in twenty-three official language versions, and that they have to convey the same meaning in all those versions. Divergences in wording and/or meaning are unavoidable; in such a case, no single language version prevails upon the others: only the ECJ may establish what must be understood as the exact meaning of a binding provision of EU law.

Broadly speaking, there are two categories of Treaty provisions as far as their wording is concerned.

- A first category of provisions, which intend to establish broad principles, consists of clauses that are worded in a rather general way. This is typically the case of Art. 2 TEU when it comes to the principle of lawfulness, i.e. the Treaty provision that corresponds to Art. 4 *European Code*.

TEU (highlighted by the Author)	<i>European Code</i>
<p>Article 2, first sentence</p> <p><i>The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.</i></p>	<p>Article 4 – Lawfulness</p> <p><i>The official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.</i></p>

- A second category of Treaty provisions, i.e. provisions that intend to establish detailed rules as regards the way in which institutions have to work or in which policies have to be developed, consists of clauses that are worded in far more precise way, using a typically legal and technical language.

<p>Article 297 (2), first sentence</p> <p>2. <i>Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them. Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication. Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.</i></p>	<p>Article 20 - Notification of the decision</p> <p>1. <i>The official shall ensure that decisions which affect the rights or interests of individual persons are notified in writing, as soon as the decision has been taken, to the person or persons concerned.</i></p> <p>2. <i>The official shall abstain from communicating the decision to other sources until the person or persons concerned have been informed.</i></p>
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- Provisions of the Charter are worded in a different way. The Convention which drafted the Charter in 2000 aimed at drafting a short text that might be understood by all European citizens, while being worded in a way that corresponds to the best standards of drafting of legal texts. However, the Charter provisions avoid going into details, in order not to overload a text that consists of a total of 54 articles and covers a very wide range of issues.

<p>Article 41 (1) Right to good administration</p> <p>1. <i>Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.</i></p>	<p>Article 17 - Reasonable time-limit for taking decisions</p> <p>1. <i>The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt. The same rule shall apply for answering letters from members of the public and for answers to administrative notes which the official has sent to his superiors requesting instructions regarding the decisions to be taken.</i></p> <p>2. <i>If a request or a complaint to the Institution cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. In that case, a definitive decision should be notified to the author in the shortest time.</i></p>
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Provisions of the EU secondary legislation are drafted in a different way from Treaty or Charter provisions. They are to some extent similar to Treaty provisions of the second category described above, in that they use a very technical wording, since their purpose is to establish as clearly as possible rights and obligations. However most of them go far more into detail than Treaty provisions.

A typical example is that of Regulation 1049/2001 on access to documents. Compared to many others (the consolidated version of the Financial Regulation, for instance, covers 86 pages of the Official journal), the Regulation is not particularly long (5 pages of the Official journal). Complicated clauses are hardly avoidable, if the legislator intends to be sufficiently precise, as demonstrated, for instance, by Art. 4 of the regulation, which establishes the principles and rules for exceptions to the right of access:

Regulation 1049/2001 - Article 4: Exceptions

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|---|---|
| <p>1. <i>The institutions shall refuse access to a document where disclosure would undermine the protection of:</i></p> <p><i>(a) the public interest as regards:</i></p> <ul style="list-style-type: none"><i>– public security,</i><i>– defence and military matters,</i><i>– international relations,</i><i>– the financial, monetary or economic policy of the Community or a Member State;</i> <p><i>(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.</i></p> <p>2. <i>The institutions shall refuse access to a document where disclosure would undermine the protection of:</i></p> <ul style="list-style-type: none"><i>– commercial interests of a natural or legal person, including intellectual property,</i><i>– court proceedings and legal advice,</i><i>– the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.</i> <p>3. <i>Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. Access to a document containing opinions for internal use as part</i></p> | <p><i>of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.</i></p> <p>4. <i>As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.</i></p> <p>5. <i>A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.</i></p> <p>6. <i>If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.</i></p> <p>7. <i>The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.</i></p> |
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Court rulings are yet again worded in a way which is very different from provisions of the Treaties, Charter or secondary legislation. We may merely state that the primary purpose of a Court ruling is to settle or help to settle a case by applying and/or interpreting the Treaties, Charter, secondary legislation, as well as so-called 'general principles of law' that may be deduced from a set of acts and documents – be they themselves legally binding or not. The purpose of a Court ruling is not to give general guidance to officials or to the public, but to resolve a specific litigation. Therefore non-specialists are not equipped to handle Court decisions without complementary training. It must be added that no document of another EU institution – such as a Communication by the European Commission – has the legally binding force of a Court ruling; therefore relying on such documents is in no way similar to relying upon provisions of the Treaties, Charter or secondary legislation.

The *European Code* has been drafted in a way that differs greatly from the aforementioned legally binding provisions. As explained by the *European Ombudsman* in his foreword to the *Code*:⁹ “*The Ombudsman uses the Code in examining whether there is maladministration, thereby relying on its provisions for his control function. But equally the Code serves as a useful guide and a resource for civil servants, encouraging the highest standards of administration*”. In a way which is to some extent comparable to the Charter, the wording of the *Code* therefore tries to meet the standards of legal texts in being clear and precise enough; furthermore it is worded in a way which enables any official to apply it, even if they have no legal education. However the main focus of the *European Code* is on EU officials, on what they should do and what they should avoid doing. Citizens, economic operators and other legal persons may only indirectly deduce their own rights from that *Code*, as counterparts of the duties of officials which are indicated therein; this is even more true in the case of the recent code of ethics adopted by the *European Ombudsman* with the title “*Public service principles for the EU civil service*”.¹⁰ At any rate, we must bear in mind that the *European Code* is not a legally binding instrument.

1.3 Subject specific and sector specific principles, rights and rules of administrative procedure

The *Working Group on EU Administrative Law*, in preparing its recommendations to the European Parliament’s *Committee on Legal Affairs*, examined a number of subject specific or subject specific or sector specific administrative procedures,¹¹ including Regulation 1049/2001 on access to documents, Regulation 45/2001 on data protection, the infringement procedure of Art. 258 TFEU, procedures in the field of antitrust, trade policy and state aid, the financial regulation, public procurement and contracts, EU civil service law, the administrative procedures applied by the European Antifraud Office (OLAF) in its investigations, as well as those applied by a number of EU agencies. The

⁹ Available at <http://www.ombudsman.europa.eu/en/resources/code.faces>

¹⁰ Available at:
<http://www.ombudsman.europa.eu/fr/resources/publicserviceprinciples.faces/en/11650/html.bookmark>, consulted on 28/06/2012.

¹¹ *Working Document*, quoted above in footnote 6, p. 15 ff.

picture that emerges from such an examination is that of a great variety in content, in the binding character of existing rules and in the focus of existing procedures.

Policy-specific or subject-specific procedures are designed in order to function in a context that varies from a sector to another; that is also due to the fact that some procedures are triggered mainly by complaints to the Commission or to an EU office or agency, whereas in other contexts the Commission and offices or agencies act upon their own initiative. When a procedure is triggered by a complaint, the position of the complainant – who may equally well be a citizen as a competitor of a given economic operator, or a specialised NGO, for instance – is very different from that of the future addressee of an administrative decision – who is very often a specific economic operator, or a group of economic operators, as is the case in the fields of competition and trade.

Specific procedures vary also according to the fact that in some cases, the procedure which has been initiated may lead to a sanction against a Member State (infringement procedure), against an economic operator (antitrust, antidumping, state aids) or against a single citizen or an economic operator (OLAF, financial regulation). Some agencies only deal with economic operators (for instance the Office of Harmonisation for the Internal Market OHIM, dealing with EU trademark; or the European financial supervisory authorities); others have also direct relevance for citizens (for instance FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union). The direct impact of agency action varies from case to case: only few of them can adopt legally binding decisions, while most of them are involved in preparatory work for decisions that are formally taken by the Commission. The emphasis on rights of citizens differs from case to case. Nevertheless all of those agencies can have direct contact with citizens etc., even if only because they will be asked for information or be required by them to act even though they do not have the required powers; in all those situations a number of principles and rules of good administration should be applicable, such as giving acknowledgement of receipt, redirecting requests to the competent body or office etc..

For all those reasons, it is hardly possible to deduct from subject specific or sector specific regulations a catalogue of minimal guarantees that would fill gaps in one or the other subject-specific or sector-specific procedural regulation and/or set of established practices. For instance, not all these procedures follow a common approach on the meaning and consequences of the right to a reasoned reply, within a reasonable time and of the consequences of a failure to reply, which are very developed, in Regulation 1049/2001 on access to documents, but not in all other regulations and sets of practices.

Although the Commission, Parliament and Council and various other EU bodies have adopted codes of good administrative behaviour, this is not yet a generalised practice. As the Working Group on EU Administrative Law rightly points out, such codes “*could be said to produce legal effects to the extent that they bind the institution that promulgated the code in question. However, they fall short of granting legally enforceable rights to individuals*”. The difference between both situations will be explained in Chapter 2 of the present Assessment Note.

It must be further underlined that there are very different practices from one institution etc. to another, and this may lead to factual discriminations between citizens, as a result of the differences in their knowledge of languages and to their more or less important ability to understand that such a code is not only an internal matter for staff, but also document that is relevant to any interested member of the public.

- For instance, strikingly, there are only eleven language versions of the *Commission's Code of Good administrative behaviour*,¹² whereas the language versions of the *European Code of good administrative behaviour* have been updated after each enlargement and even in view of the following ones; the relevant Commission Internet page in Polish, for instance,¹³ only gives links to the versions in Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish, i.e. the EU's official languages before the 2004 enlargement.
- The European Environment Agency (EEA), on the other hand, itself adopted the *European Code* itself by a decision made by its Management board of 22 June 2004; the Internet page of the EEA gives somewhat misleading indications about the *European Code* – albeit in all good faith;¹⁴ the EEA's web page establishes a link with the site of the *European Ombudsman*, so that all 23 language versions of the *Code* are available.
- The European Chemicals Agency (ECHA), on the other hand, has adopted its own code in 2007. The code follows the structure of the *European Code*, and differs only very slightly from the latter; in most cases the reason for such a difference is not clear and does not seem to be related to the special duties of the Agency.¹⁵ Nevertheless, there seems to be only one language version available (English). Contrary to the English language page of the Agency's website, which has a link to the relevant document, the other language versions provide no such link.

¹² Available at: http://ec.europa.eu/transparency/civil_society/code/index_en.htm; consulted on 28/06/2012.

¹³ Available at: http://ec.europa.eu/transparency/civil_society/code/_docs/code_pl.pdf; consulted on 28/06/2012.

¹⁴ The EEA's web page indicates: "A code of good administrative behaviour is a document which set outs the basic principles of good administration. These principles are legally binding for officials when they deal with the public". On the contrary, these principles are not legally binding. As the Code is not Agency specific, it is also somewhat misleading to state: "With the help of the code, members of the public know exactly how the Agency works and what rights they have in their dealings with the Agency", which was probably the case of the previous own code of the agency, which was repealed in order to apply the *European Code* by analogy. See: <http://www.eea.europa.eu/about-us/documents/administrativedocuments/codeofgoodbehavior.html>; consulted on 28/06/2012.

¹⁵ Available at: <http://echa.europa.eu/en/about-us/the-way-we-work/procedures-and-policies/code-of-good-administrative-behaviour>; consulted on 28/06/2012.

The fact that many language versions are missing is not per se a problem for codes which are supposed to be observed by EU officials, as they all know some of the languages in which there is an available version. However, the absence of specific language versions impedes the use of those codes as instruments to communicate their rights to citizens etc. from the countries for which there is no code in the country's official language.

1.4 Lacunae in existing binding law as to the wording of rules and principles of EU administrative procedure

Comparing the principles, rights and rules of administrative procedure which are guaranteed in some way by EU binding law – or at least by non-binding instruments like the *European Code* – with existing Member States' Laws on administrative procedure shows that a number of principles, rights and rules are to a great extent absent from general EU law and standard practices of administrative procedure.

It may well be that some, or even many of those principles, rights and rules are present and applied in specific policy sectors, and also known to most of the economic operators in that sector. By definition, however, sector based principles, rights and rules are not applied across the board.

Table 3 gives a series of examples of principles, rights and rules which are present in some or in many Member States' laws on administrative procedure and are missing as far as EU administration as a whole is concerned. The Author of the present Assessment Note has limited the enquiry to a small number of Member State's laws, representative of different administrative and legal cultures and different periods in which the relevant laws have been adopted: the German federal law of 1976; the Italian law of 1990; the Netherlands law of 1992; the Spanish law of 1992 and the Swedish Law of 1986.

Table 3 is by no means comprehensive. There may be other principles, rules and rights relating to administrative procedure in other member States' laws on administrative procedure, or in established case law and practices in Member States. There are also interesting principles, rules and rights in the laws on administrative procedure of third countries, such as for instance the provisions on 'notice and comment' of the US Administrative Procedure Act, 1946, which have set up a comprehensive system of participation in administrative rule-making.

The headings used in the Table 3 mostly correspond to the headings of relevant clauses in Member States' laws. The short comments in Table 3 only point to the existence of a relevant case law of the ECJ that may be generalised, or of some subject specific or sector specific regulations and practices: the comments are limited to antitrust and trade but this by no means imply that there are not other subject specific or sector specific regulations and/or practices addressing the same issue.

Table 3: Other Procedural Rules and Rights

Other non-EU Principles, Rules and Rights	Binding National Law	Comment
1. Binding force of decisions	German law § 43 Italian law Art. 21-bis & ter	ECJ case law
2. Nullity of decisions	German law § 44 Italian law Art. 21 quinquies & octies Spanish law Art. 62-67	ECJ case law
3. Correction of faulty procedures and forms	German law § 45	ECJ case law
4. Change of legal basis	German law § 47	ECJ case law
5. Withdrawal of an illegal decision	German law § 48 Italian law Art. 21 nonies Spanish law Art. 102-106	ECJ case law
6. Withdrawal of a legal decision	German law § 49 Italian law Art. 21 quinquies Spanish law Art. 102-106	ECJ case law
7. Officer responsible for a procedure	Italian law Art. 4-6	Antitrust/trade
8. Communication of the opening of a procedure	Italian law Art. 7-8	Antitrust/trade
9. Interventions in a procedure	Italian law Art. 9	Antitrust/trade
10. Representative or counsel	German law § 14 s. Swedish Act Sect. 9 Netherlands law Art. 2:1-2	Antitrust/trade
11. Rights of participants to a procedure	Italian law Art. 10 Spanish law Art. 84-85	Antitrust/trade
12. Oral procedure	Swedish Act Sect. 14	Antitrust/trade
13. Expert evaluation	Italian law Art. 17	Antitrust/trade
14. Reopening of a procedure	German law § 51	Antitrust/trade
15. Formal conclusion of a procedure	Italian law Art. 2	Antitrust/trade
16. Restitution of documents and objects	German law § 52	Antitrust/trade
17. 'Conference of services'	Italian law Art. 14 Spanish law Art. 5	Commission interdepartmental groups

18. Voting and dissenting opinions when decisions are made by several persons	Swedish Act Sect. 19	'Comitology' rules
19. Cooperation between administrative authorities	German law § 4-5 Swedish Act Sect. 6	
20. Self-certification	Italian law Art. 18	
21. Declaration of beginning of an activity	Italian law Art. 19	
22. Effects of silence of the administration	Italian law Art. 20 Spanish law Art. 43	Art. 265 TFEU
23. Replacing a decision with a contract	German law § 55 s.	
24. Use of electronic means	Netherlands law Art. 2:13-17	

The principles, rights and rules of administrative procedure identified in Table 3 belong to at least five different categories.

The principles indicated under points 1 to 5 are present in many laws on administrative procedure; however they do not establish procedural rules as such, but rather define which legally binding rules are attached to a 'decision' or 'act' of public administration. The relevant case-law of the ECJ has been to a great extent influenced by equivalent legal principles of the Member States, in which it exists sometimes as part of a Law on administrative procedure, and at other times as principles established by competent courts. As already mentioned, case law is by no way easily accessible to non-experts.

Points 6 to 16 refer to typical principles, rights and rules of administrative procedure, which are also to be found in some subject specific or sector specific EU regulations or practices. Their presence in general laws on administrative procedure of Member States demonstrates that they may be generalised, at least as minimum standards and guarantees.

The principles and rules under points 17 to 19 are particularly interesting in that they take into due account the fragmentation of administration, a phenomenon which is not only a characteristic of Member States, but also of the EU, where there are different EU institutions, bodies and an ever growing number as agencies, as well as in the Commission itself, whose offices are even sometimes separated physically (while most are located in Brussels, some of the them are in Luxembourg or elsewhere, as for instance the Joint Research Centre, which is formally a Commission DG and has locations in five different Member States).

The principles, rights and rules under points 20 to 22 and 24 are indicated by Directive 2006/123 of 12 December 2006 on services in the internal market, as principles and rules that should prompt more efficiency of the Member State's administrations that have a

role in the field of services in order to facilitate their free movement. Truly, EU institutions etc. do not theoretically exercise the typical function that are exercised by the relevant Member States' administrations in the field of services (i.e. authorising and licensing activities); nevertheless there are a number of situations where similar EU rules might be useful, as demonstrated by the rules of Art. 265 TFEU on the remedy for failure to act on the part of an EU institution.

Last but not least, it is worthwhile underlining that a number of Member States have adopted a comprehensive set of principles and rules on the use of electronic means by public administration (point 24 of Table 3), whether as a section of the general Law on administrative procedure, or by specific legislation. While connected to the legislation on data protection, legislation on the use of electronic means is a much wider topic; its relevance for EU administration is increasing, especially as the number of networks based upon electronic means in which the Commission and other EU institutions, bodies, offices and agencies are participating in one way or another is undergoing constant, rapid development.

1.5 Issues Raised by the Status Quo

As appears from the analysis of the status quo in EU administrative procedures, a number of issues exist, that are calling for some action by the EU institutions, which might take the form of a General EU Law on Administrative Procedure as requested by the European Parliament or another form such as other subject specific regulations, following the example of Regulation 1049/2001 on access to documents and Regulation 45/2001 on data protection. The pros and cons of different forms of action will appear in chapter 2 of this Assessment Note. This section only aims at summarising the issues raised by the status quo.

Taking the *European Code of Good Administrative Behaviour* as a starting point, it appears that, whereas most of its provisions correspond to clauses embedded in the EU Charter and Treaties, or in secondary EU legislation, the wording of binding law provisions lacks the clarity and precision of the corresponding non legally binding articles of the *European Code*. There is an issue of clarity about rights and obligations for citizens, economic operators and other legal persons who have to deal in a way or another with EU institutions, bodies, offices and agencies. Doing nothing fosters de facto discrimination between the best organised and most powerful economic operators and NGOs, who can afford to employ well-trained specialists and lawyers, and ordinary citizens, small and medium enterprises and smaller NGOs who can only rely on the information available mainly on the Internet sites of either EU institutions, bodies, offices and agencies, or more powerful NGOs.

There are lacunae in the existing set of legal principles, rights and rules that apply to EU administrative procedure. Some of the provisions of the *European Code* are not matched by corresponding binding law clauses. Some other guarantees and standards of EU administrative procedure are set up only in EU documents or measures that have no binding force. A comparison with Member State's laws on administrative procedure indicates that there are further principles, rights and rules which are missing in EU law,

non-binding measures or documents. Doing nothing means that there remain gaps in the guarantees and standards of good administration. If EU institutions, bodies, offices and agencies do not undertake to fill the gaps on their own, the only remedies available to citizens, economic operators and other legal persons are to complain to the *European Ombudsman* or file a law suit. The latter is costly, especially in view of the absence of clear rights or principles in established binding law. Even if a remedy is available, the solution often arrives too late to avoid harmful consequences for the citizens or economic actors. In both cases, relying only on those remedies will necessarily increase the workload of the *European Ombudsman* and ECJ.

Only few EU regulations embed principles, rights and rules of administrative procedure that are supposed to apply across the board to all EU policy sectors and to all EU institutions, bodies, offices and agencies. It is not always clear whether those few general regulations apply indeed to all policy sectors and institutions, bodies, offices and agencies. Subject-specific or sector-specific regulations and practices on administrative procedure differ from one case to another. Not all differences are the inevitable consequence of objective differences between one sector and another. In some sectors there is a lack of regulations and established practices that guarantee the rights of citizens, economic actors and other legal persons. The status quo generates uncertainty in the minds of citizens and economic operators, as well as in the minds of EU officials; in turn such uncertainty will most probably augment litigation. Indeed, there will be situations where citizens etc. will rely on the formulation of rights which they will find in one sector specific or subject specific regulation and make claims that are not necessarily sustained by that regulation in another field, whereas EU officials might on the contrary be convinced that those provisions do not apply to the field they are working in. A good lawyer would try and sustain with the ECJ that the sector-specific or subject-specific provision is the expression of a general principle of law; at the end of the day, only the ECJ can decide what a general principle is and what it is not.

Furthermore, the EU institutions etc. make a growing use of contract and other types of agreements – especially services contracts – for the implementation of their programmes. The financial regulation applying to such situations only focuses on the protection of the EU's financial interests and does not take into account the right to a good administration of contractors, sub-contractors and third parties; this appears from a number of appeals submitted to the *European Ombudsman*.

Last but not least, language versions may constitute a major issue, the negative effect of which is probably much underestimated in many institutions, bodies, offices and agencies. Only binding EU regulations (or directives and decisions, if applicable) and the *European Code* are available in all official EU languages. Documents that are not available in all languages can hardly have the function of clearly establishing the rights of citizens across the entire Union. As far as economic operators and other legal persons are concerned, it cannot be assumed that all of them are masters of the English language or one of the other most used working languages of the EU.

2. Potential effects for citizens, economic operators and other legal persons of an EU law on administrative procedure

Key findings

- The instrument of an EU regulation offers a series of advantages for a wording which is both sufficiently precise and written in a user-friendly language: it has necessarily to be published in all language versions, with the benefit of the involvement of lawyer-linguists; the involvement of MEPs in the ordinary legislative procedure offers a unique opportunity to check its closeness to the citizen and user-friendly character; and far from being an impediment to flexibility a formal regulation is adopted through mechanisms that should guarantee that provisions are built into it, in order to keep it flexible to the necessary degree.
- Such an instrument would help in establishing a single, easily identifiable and comprehensible set of rules and standards, that could increase guarantees for citizens, economic operators, NGOs and other legal persons across the board; that includes, amongst others, two main sectors where there are still some unresolved problems such as the infringement procedure of Art. 258 TFEU, and the administrative procedures applied by OLAF in its investigations.
- Such an instrument would make it possible to fill gaps and lacunae in the current set of rules and standards applying to EU administrative procedures. Four examples may better illustrate how an *EU Law of Administrative Procedure* could operate in this respect, i.e. on the issues of time limits for decisions, of cooperation between administrative authorities, of contracts and other agreements, as well as of participation rights.
- Such an instrument could provide for more coherence, in order to avoid the disorientation that is bound to be felt by citizens etc. who have to deal with different offices or agencies – or even with different institutions and bodies – due to their own different activities. The example of acknowledgement of receipt is probably one of the most useful in this respect. Furthermore such an instrument would become a template for further elaboration in new subject-specific or sector-specific regulations or new offices' or agencies' internal regulations and would foster more homogeneity in the presentation and wording of principles, rights and rules of administrative procedure.
- Only a binding instrument would necessarily be mandatory for everybody – i.e. officials in charge of applying the law as well as citizens, economic operators, NGOs and other legal persons, and, last but not least, courts – and thus have the capacity to establish rights for citizens etc.; it may be the basis for a claim in court, and non compliance may lead to sanctions decided by a judge. In the

multicultural context of the European Union, the binding character of law gives a higher profile to an instrument of this kind in the minds of officials, citizens etc. coming from most of the Member States. It would have a series of positive consequences which are illustrated in this note by the case of the duty to indicate remedies.

- Experience in State public administration demonstrates that it is not the binding character of a law of administrative procedure as such which generates negative consequences, but the wording of the relevant provisions, and the general approach to the implementation of such a law.

2.1. Potential effects of the general character of an EU law on administrative procedure

Analysing the issues raised by the status quo under Chapter 1 leads us to find solutions through an *EU Law of Administrative Procedure* that would be applicable across the board to all institutions, bodies, offices and agencies and to all policy sectors.

From a formal point of view, an *EU Law of Administrative Procedure* has to be a 'regulation' in the sense of Art. 288 second sentence TFEU, which establishes that "*A regulation shall have general application. It shall be binding in its entirety [...]*".¹⁶ The potential effects of the binding character of such a regulation – as opposed to the existing *European Code of Good Administrative Behaviour*, which does not have binding character – will be outlined in Section 2.2 of this Chapter. The present section discusses the potential effects of the general character of this regulation – as opposed to the subject specific or sector specific character of existing regulations or future new specific ones.

2.1.1. An EU Law of Administrative Procedure Embedded in an EU Regulation

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights – which includes an Art. 41 on the right to good administration – has acquired a legally binding character. After having established in par. 1 that "*every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*", par. 2 of that article continues with the statement that "*this right includes*" a few more specific rights. This wording means that the content of Art. 41 (2) is not exhaustive, and therefore, in the view of the interested citizens etc., it calls for an instrument that would flesh it out. With the entry into force of the Lisbon Treaty there is now a specific legal basis for the adoption of a regulation establishing a general EU Law on Administrative Procedure, i.e. Art. 298 TFEU.

¹⁶ The quoted text continues then states that a regulation shall be "*directly applicable in all Member States*"; that part of the sentence does not apply in the case of a regulation only addressed to the EU institutions, bodies, offices and agencies, as will be explained in Chapter 4.

It goes without saying that the clarity of the principles, rights, rules and standards established in an *EU Law of Administrative Procedure* would depend upon the wording of the relevant provisions, which need to be both precise enough to avoid useless litigation on their meaning, but also have to be written in a user-friendly language that does not deter non-specialists on first reading.

The instrument of an EU regulation offers a series of advantages for this purpose.

First, and contrary to non-binding codes and documents describing administrative practice, an EU regulation must necessarily be published in all language versions, as required by Regulation 1/58 on the rules governing the languages of the institutions of the Union. A new language version will therefore have to be available with each enlargement of the EU to a new Member State. Furthermore, the multilingual drafting techniques applied to EU legislation, delegated acts and executive acts would be used in drafting the EU Law on Administrative Procedure: when preparing the draft of a Commission proposal to the EU legislator, the text is submitted to scrutiny by specialised lawyer-linguists who check the availability of equivalent wordings and concepts for all the provisions of the text in all 23 language versions. The proposal is only formally endorsed by the members of the Commission when it is available in all language versions. In the same way the specialised officials of the General Secretariat of the Council also check the compatibility and homogeneity of all language versions before a text is submitted to the Council – who normally votes upon a text after it has been submitted for the approval and amendments of/by the Parliament. Furthermore, as Members of the European Parliament (MEPs) usually make use of their own language, discussions in the European Parliament will usually reveal differences in language versions and in their perception.

Second, a regulation based upon Art. 298 would be adopted according to the ‘ordinary legislative procedure’, in which the European Parliament has its full powers as a co-legislator. MEPs being representatives of EU citizens, usually and quite naturally have more interest for /in ordinary citizen’s problems than officials of the Commission, and officials of the Member States who prepare the decisions of the Council. The diversity of professional backgrounds of MEPs offers furthermore a unique opportunity to check the user-friendly character of the wording of such a regulation in all official languages.

Third, any change to the *EU Law of Administrative Procedure* would also need to be adopted according to the ‘ordinary legislative procedure’. The formal character of the amending procedure is often seen as leading to a lack of flexibility. Experience shows however that non-binding codes and documents describing administrative procedures to be followed are not necessarily revised more quickly or more often. Typically, the *Commission’s Code of Good administrative behaviour*, adopted on 13 September 2000, has not been updated since then. In the meantime however the two regulations on access to documents and on data protection were adopted in 2001. Also, no new language version of the *Commission’s Code* has been published, although the number of official languages has increased from eleven to twenty-three. Furthermore, the Lisbon Treaty entered into force on 1 December 2009, leading to important modifications in the powers and

procedures of EU institutions that may have an impact on the Commission's work, and to a number of formal changes – also in vocabulary, as well as in the numbering of relevant Treaty articles; the entry into force of the Lisbon Treaty has however not yet prompted a revision of the *Commission's Code*. Alternatively, when making a legislative proposal to the EU Council and Parliament, the Commission is fully aware of the constraints linked to the amending process; so are the Council and Parliament acting as legislator: this usually leads to a more careful formulation than in the case of a document which is deemed easy to change, such as an institution's non-binding code – even though in practice it is as permanent as a piece of legislation. In other words, far from being an impediment to flexibility – which is not demonstrated by facts – a formal regulation is adopted through mechanisms that should guarantee that provisions are built into it, in order to keep it flexible to the necessary degree.

2.1.2. A Single Set of Rules and Standards, Easily Identifiable and Comprehensible

The *European Ombudsman* also had task to establish a single set of minimum general principles, rights, rules and standards more than ten years ago when he proposed the adoption of a single code for all EU institutions and bodies. Without going back to the reasons which were brought forward at the time by the Commission and Council avoid a common regulation for all institutions, a few points need to be stressed here.

First, from a formal legal point of view, it was not obvious that there would be an appropriate legal basis in the EC Treaty for the adoption of such a regulation; this has been remedied with the introduction in the TFEU of Art. 298 that empowers the European Parliament and the Council to adopt regulations with the end of guaranteeing that “*in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration*”.

Second, since the adoption of the *European Code*, two important regulations have been adopted, which guarantee specific rights in administrative procedure. Regulation 1049/2001 on access to documents and Regulation 45/2001 on data protection are correctly considered as the most elaborate sets of principles, rights and rules of administrative procedure applicable across the board at EU level for their own specific purpose. Although they were adopted by the EU legislator in the same year (2001), cases submitted to the European Court of Justice and to the *European Ombudsman* have shown that several difficulties arose in applying both sets of rules in a coordinated way. It is sometimes very difficult to reconcile the right of access to documents of a citizen etc. with another citizen's right to data protection.

Such situations have been illustrated by the *Bavarian Lager case*; it was a veritable saga starting in 1993 with a request to the Commission to open an infringement procedure against the United Kingdom. The request was made by an economic operator – Bavarian Lager – who also asked for communication of documents in the framework of that procedure. The issue about access to documents was eventually settled by an ECJ

ruling of 2010.¹⁷ Without going into further detail, it may be indicated that, once the two regulations of 2001 had been adopted, the *European Data Protection Supervisor* (EDPS) as well as the governments of Denmark, Finland and Sweden were in favour of a solution that would allow access to documents to prevail over the prohibition to disclose documents containing personal information, such as the names of participants in a working meeting. Such a position was similar to the usual position held on these issues by the *European Ombudsman* who has an important role in the implementation of the Regulation on access to documents. On the other hand, the Commission, the Council and the United Kingdom government were against disclosure. In the specific case it took a fair number of years for a final answer to be given, and the Court's position has been criticised by commentators, but the issue has been settled as far as the current regulations are concerned.

This is to say that written binding documents can also generate quite complex situations, especially if they are not sufficiently coordinated at drafting stage. True, there are often also problems of coordination between different provisions of a single legal instrument, but – unlike the case where there are two different subject-specific regulations – there are normally no disputes about their applicability to a single case. More importantly, a single instrument would be prepared in the Commission under the leading of one and the same service; it would have one and the same rapporteur at the European Parliament; and discussing the different provisions in the same process would make it easier for the legislator to become aware of issues of coordination.

Third, the experience accumulated over the last two decades by the *European Ombudsman* in dealing with complaints on maladministration has shown that there are a number of fields where officials do not take sufficiently into account the fact that citizens etc. whom they are dealing with have a right to good administration, especially when there is no applicable subject-specific or sector-specific regulation. The Working Group on EU Administrative Law, in preparing its recommendations to the European Parliament's *Committee on Legal Affairs*, identified amongst others two main sectors where there are still some unresolved problems, to which the attention of the *European Ombudsman* had also been attracted: the infringement procedure of Art. 258 TFEU,¹⁸ and the administrative procedures applied by OLAF in its investigations.¹⁹

The infringement procedure of Art. 258 TFEU is a procedure against Member States who do not comply in an appropriate manner to their obligations to apply EU law. The procedure may be triggered by a complaint to the Commission, and therefore may become a good means of better involving citizens etc. in the case of an oversight in good application of EU law, which is one of the fundamental tasks of the Commission. There is no doubt that the Treaty gives the Commission full discretion in deciding whether to start such a procedure against a Member State or not. Complaints to the *European*

¹⁷ Judgment of the Court (Grand Chamber) of 29 June 2010, *Bavarian Lager v. Commission*, Case C-28/08 P.

¹⁸ *Working Document*, quoted above in footnote 6, p. 17-20.

¹⁹ *Working Document*, quoted above in footnote 6, p. 25-26.

Ombudsman and petitions to the European Parliament have shown that too little account had often been taken of the position and rights of complainants while deciding on the further steps after a complaint. This is particularly important as citizens etc. often rely on the Commission to help them if they encounter difficulties due to an inappropriate application of EU law in Member States.

The *Working document of the Working Group on EU Administrative Law* states that “Unlike other areas for which the Union legislator established advanced administrative procedures (e.g. competition law, state aid, public procurement), the Commission developed its procedures in a relative vacuum on the basis of its discretionary power to organise its own work. Since the late 90s, and in part, due to the activity of the European Ombudsman, a series of procedural commitments were made by the Commission in relation to complainants”. The commitments that are then listed²⁰ correspond to typical general principles, rights and rules of administrative procedure, namely: to acknowledge any correspondence within 15 working days; to register any correspondence which is “likely to be investigated as a complaint”; to give reasons for not registering a complaint and indicate alternative forms of redress for the complainant; to respect confidentiality of identity vis-à-vis the Member State if requested by the complainant; to keep the him/her informed of the course of any the procedure; to endeavour to take a decision to open infringement proceedings or to close the case within a given time limit; to inform the complainant in advance with reasons if the Commission plans to close the case. The Commission has reformed its internal administrative procedure with a pilot exercise named ‘EU Pilot’. While acknowledging these efforts the *Working Group* “was left with a mixed impression of the position of complainants, who have a rather uneasy part to play in this administrative procedure, which is largely closed and bipolar in nature and focuses on dialogue and mutual accommodation between Commission and Member States”.²¹ This shows that, as is quite logical, that the Commission officials dealing with infringement procedures focus on their interaction with Member States and that this may drive them to neglect the complainants’ rights during the procedure.

An *EU Law of Administrative Procedure* which would be applicable across the board would have at least two positive consequences for complainants in infringement procedures. First, there would be no doubt that procedural rules of the kind listed above are not only commitments of the Commission, depending on its good will, but the consequence of the procedural rights of complainants (see Section 2.2), which have to be upheld regardless of the decision of the Commission to proceed or not with an infringement procedure against a Member State. Second, such a general regulation would be an incentive for the Commission to further examine whether there is a need for specific rules in the framework of complaints that may lead to an infringement procedure – for instance different types of acknowledgements of receipt, as occurs in current practice; and/or a specific set of deadlines. There would also be an incentive for the Commission to prepare a proposal for a specific binding regulation on infringement procedures in order to clarify the scope and content of rights of complainants and to

²⁰ *Working Document*, quoted above in footnote 6, p. 18-19.

²¹ *Working Document*, quoted above in footnote 6, p. 20.

differentiate the relevant provisions from other procedural aspects which only apply to the relationship between the Commission and Member States – as otherwise only the rules and principles of the regulation on an *EU Law of Administrative Procedure* would apply.

The administrative procedures applied by the European Anti-Fraud Office (OLAF) in investigations are also particularly interesting, because they have potential implications on the fundamental rights of the persons involved in such investigations. Those persons are mainly staff members of EU institutions etc. but investigations may also happen to have to deal with other persons, working for public authorities, NGOs, bodies or companies receiving EU funding. In any case, the problem is that involvement in such proceedings may eventually lead to disciplinary or even criminal sanctions, or to being ‘blacklisted’ for certain types of activities. The procedures of OLAF are however not criminal procedures in the legal sense, and therefore the usual guarantees for criminal procedures do not apply automatically. As noted by the Working Group on EU Administrative Law, OLAF’s present day ‘Manual of Operational Procedures’ is a set of internal instructions to the staff; in the words of the OLAF Director-General instructions “are not intended to have any legal force: they simply determine the practice to be followed in order to implement the applicable legal framework”.²²

A proposal for a *Procedural Code for OLAF Investigations* has been on the table since 2008; whatever its content may be, this would be yet again a non-binding code. Looking at the procedural guarantees which the Commission is proposing to provide, it clearly appears that they include typical rights of administrative procedure law, such as the right for the person concerned by an investigation to make his/her views known before conclusions referring by name to him or her have been drawn; the right to be given a summary of the matters under investigations and to be invited to comment on these matters; the right to be assisted by a person of his/her choice during an interview; the right to use the EU language of his or her choice; and setting up a specific administrative review proceeding before an independent body. There is also a typical right that is usually found in criminal procedural law, but could easily be transposed to administrative procedures, i.e. the principle that any person concerned by an investigation shall be entitled to avoid self-incrimination. An *EU Law of Administrative Procedure* that would be applicable across the board would have at least three positive consequences for persons involved in OLAF proceedings. *First*, as already stated for infringement procedures, there would be no doubt that procedural rules of the kind listed above are not only commitments of the OLAF, depending on its good will, but that they are the consequence of procedural rights of complainants (see Section 2.2) that have to be upheld regardless of the outcome of OLAF’s investigations. *Second*, EU Courts and also Member States’ courts that might have to deal with the consequences of OLAF investigations referring to a specific person would have stronger means than under the status quo in order to draw consequences of the lack of respect for procedural guarantees during investigations. *Third*, such a general regulation would be an incentive for the Commission (of which OLAF is an office, albeit enjoying a number of guarantees

²² *Working Document*, quoted above in footnote 6, p. 25.

of independence) to proceed more rapidly with the adoption of its *Procedural Code for OLAF Investigations*.

2.1.3. Filling Gaps and Lacunae of Rules and Principles of EU Administrative Procedure

An *EU Law of Administrative Procedure* would make it possible to fill gaps and lacunae in the current set of rules and standards applying to EU administrative procedures. The relevant topics have been identified in Chapter 1 of the present Assessment Note. Four examples may better illustrate how an *EU Law of Administrative Procedure* could operate in this respect, i.e. on the issues of time limits for decisions, of cooperation between administrative authorities, contracts and other agreement, as well as participation rights.

Time limits are one of the endless issues in the relationship between public authorities and citizens as a balance has to be struck between quick action and cautious handling of a matter and as the level of staff resources has a direct impact upon the possibility to deal with cases in a rapid way. As far as time limits for administrative procedures are concerned, Art. 41 (1) of the Charter states that “*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*”. The rulings of the ECJ referred to by the Explanations to the Charter give no further indications on the concept of “*reasonable time*”; this is quite normal as the Court can only decide in a given case whether “*reasonable time*” has been exceeded. The case law of the ECJ is particularly difficult to summarise, as most of the rulings where it examines whether a reasonable time limit has been exceeded concern judicial proceedings with the General Court, or administrative or judicial proceedings in Member States. Art.

17 Article of the *European Code of Good Administrative Behaviour*, on the Reasonable time limit for taking decisions is more precise. As a rule, Art. 17 (1) establishes that “*The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time limit, without delay, and in any case no later than two months from the date of receipt. The same rule shall apply for answering letters from members of the public and for answers to administrative notes which the official has sent to his superiors requesting instructions regarding the decisions to be taken.*” It must be stressed that the limit of two months is the same as the time limit for requiring judicial review of a decision by the EU’s General Court. Even though in a normal situation two months should be sufficient to prepare a decision on a simple case, Art. 17 (2) establishes – in order to ensure the necessary flexibility which is needed for more complex cases – that “*If a request or a complaint to the Institution cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. In that case, a definitive decision should be notified to the author in the shortest time*”. If a provision of that type were set as a general rule in the regulation establishing an *EU Law of Administrative Procedure*, officials and the public would have in mind the ordinary deadline of two months. It would not impede establishing more detailed sets of rules in subject specific or sector specific regulations, as is the case, for instance, in articles 7 and 8 of Regulation 1049/2001 on access to documents.

Furthermore, it is possible to establish a good wording of the relevant clause of the *EU Law of Administrative Procedure*, in order to allow for an extension of time limits when necessary.

Cooperation between administrative authorities is another topic for which there are specific provisions in Member States' laws on administrative procedure, as indicated in Chapter 1, section 1.4. That is the case for instance in Germany, where federalism is a factor of multiplication of administrative authorities, but also in Sweden, which is a unitary State and has a population of about 1/10th of that of Germany. On the same kind of issue, the Italian and Spanish laws on administrative procedure provide for a coordination system wherever more than one single office has to participate in the final decision about the request or file of a citizen or legal person. Such a system includes the appointment of an 'officer responsible for the procedure' and the establishment of a 'conference of services', i.e. a formal system to ensure that all relevant offices participate in the discussion through a meeting or an equivalent mechanism.²³ There is no equivalent set of general provisions in EU law. Art. 15 of the *European Code on the Obligation to transfer to the competent service of the Institution* addresses only one aspect of the issue. Art. 15 (1 and 2) establishes that "If a letter or a complaint to the Institution is addressed or transmitted to a Directorate General, Directorate or Unit which has no competence to deal with it, its services shall ensure that the file is transferred without delay to the competent service of the Institution» and that "The service which originally received the letter or complaint shall notify the author of this transfer and shall indicate the name and the telephone number of the official to whom the file has been passed".

A similar provision in an *EU Law of Administrative Procedure* would greatly facilitate the life of citizens and economic operators, especially if the relevant provision had a broader scope, i.e. the transmission from one EU institution, bodies, office or agency to another, as foreseen in the mentioned Member States' laws. Such a provision would indeed remedy the classic situation due to the specialisation of offices, whereby a citizen or economic operator is sent from one office to another without knowing where he/she should address his/her request. Art. 15 (3) of the *European Code* establishes that "The official shall alert the member of the public or organisation to any errors or omissions in documents and provide an opportunity to rectify them". Such a provision corresponds to the core idea of the 'officer responsible for the procedure' and could be further developed in order for the citizen or economic operator to be able to count upon the assistance, if needed, of an official who knows how the procedure is evolving. The same idea explains why Directive 2006/123 of 12 December 2006 on services in the internal market establishes in its Art. 6 the obligation for Member States to set up a system of 'points of single contact'. The provision discussed here could also be further elaborated in order to foster organisational forms of mutual cooperation, especially between the Commission and EU agencies.

²³ A similar practice exists in the Commission with 'interdepartmental groups' (*groupes interservices* in French); these are however not established in the interest of outsiders, contrary to the 'conference of services'.

EU institutions etc. make a growing use of contract and other types of agreements – especially services contracts – for the implementation of their programmes. This is the case for the majority of EU activities in the field of research and technological development – which is fostered throughout the Union by giving contracts, grants and subsidies to researchers and research centres – or for cooperation development – whose operational aspects are usually entrusted to NGOs, specialised companies and experts with whom the Commission enters into agreement. The provisions of the EU financial regulation that apply to such situations focus on the protection of the EU’s financial interests and do not take sufficiently into account the right to a good administration of contractors, sub-contractors and third parties. Current EU law provides for a different regime accordingly when contractual relationships are at stake or when formally speaking a ‘decision’ has to be taken, thereby reducing the possibilities for a court review of agreements. Furthermore, if contracts and agreements do not specify that the EU courts are competent for litigation, issues relating to the management of contracts or agreements are to be submitted to national courts, from Member States or even third countries, depending on somewhat complicated rules. Furthermore, as is usually the case in contract law, a subcontractor has no standing to ask for judicial review of a negative decision of the contractor: that decision is based upon the relationship of the latter with a EU institution. A series of problems have therefore also led to appeals to the *European Ombudsman*, who usually deals with them in trying to apply the principles and rules of good administration. With a well-drafted clause on its scope, an *EU Law of Administrative Procedure* would be applicable to all those situations where citizens etc. have a direct or indirect contact with EU administration; this would establish a set of minimum guarantees for contractors, sub-contractors and third parties. Depending on the drafting of the clause on the scope of an *EU Law of Administrative Procedure*, they could also rely on those rights to appeal to EU Courts if necessary.

Participation rights are only dealt with in a rather limited way in present day EU law on administrative procedure. As recalled by Art. 41 (2) of the Charter, the right to good administrations includes: “(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy”.

These rights are only applicable in cases where the EU institutions etc. have the power to take a decision that affects a specific citizen or economic operator etc. The scope of the provision does not include a very important part of the activities of the Commission and of a number of agencies, namely to adopt regulatory instruments. The provision does not appear to be applicable to procedures which are preparing Commission decisions, as is the case of the activity of many regulatory agencies. Furthermore there are important legal limitations resulting from the EU system of remedies, and which impede an appropriate development of participation rights in such procedures. Art. 263 TFEU opens the possibility for an action in annulment for citizens etc. only against a decision of which they are an addressee, or against “a regulatory act which is of direct concern to them and does not entail implementing measures”, and if there are implementing measures only if those are “of direct and individual concern to them”. Without going into technicalities, Art. 263 may lead to the possibility of obtaining redress through an action

in annulment before the General Court having serious limitation when it comes to regulatory acts. Participation rights in regulatory procedures are not a very common topic in the Laws of Administrative procedure of European countries, although there are some new developments in the field. On the other hand, the United States' *Administrative Procedure Act, 1946* has established a fairly widely-known procedure called "*notice and comment*" in order to provide for the participation of interested citizens, economic operators and NGOs in the preparation of regulatory instruments adopted by public authorities (agencies, in the US vocabulary). Interestingly, this system is to a certain extent comparable to the practices of public consultation developed by Commission under the labels 'better regulation' and 'smart regulation'. A striking difference between the U.S. 'notice and comment' procedure and the EU public consultation scheme is that the former only applies to regulatory acts adopted by public administration, and not to legislation passed by Congress, whereas the EU consultation scheme is designed for legislative acts. No general system of consultation is provided for delegated and executive acts which the Commission is very often empowered to adopt on the basis of a legislative act. No provisions to this regard are included in Regulation 182/2011 on mechanisms for control of the Commission's exercise of implementing powers, for a number of legally quite logical reasons.

There are quite a number of procedural principles, rights and rules that may contribute to a better involvement of citizens in administrative procedures, as explained above for the infringement procedure. Indeed, also in procedures leading to a regulatory act, citizens etc. may have direct contact with EU institutions etc. The relevant principles, rights and rules also include the principle of transparency as well as rules on the initiation of administrative procedure, impartiality of administrative decisions, time limits, and duty to state reasons. With a well-drafted clause on its scope, a *EU Law of Administrative Procedure* would be applicable to all those situations where citizens etc. may have a direct contact with EU administration, even if the outcome is not expected to be an individual decision; this would establish a set of minimum guarantees while leaving to other instruments, whether they be subject-specific, sector-specific or general, the establishment of specific participation rights for citizens etc.

2.1.4. Ensuring More Coherence across Bodies, Services and Agencies and Across Policy sectors

There are good reasons for differences in the procedures applying in different sectors. In the field of competition or trade, for instance, the Commission has important powers that may lead to financial sanctions or decisions that have a major negative impact on an economic operator. Therefore the relevant procedure needs to incorporate a series of guarantees of due process in favour of the economic operators, as well as a number of principles and rules in order to protect so-called 'diffuse interests' – i.e. interests which are not identified with an economic operator or a group of them, but with the broader public, usually represented by NGOs, if any – and the general interest of the Union. There are however many cases where the differences between existing subject-specific or sector-specific regulations or practices are only due to the fact that the relevant documents have been set up at different moments and by different institutions, bodies, offices or agencies of the EU.

One very simple example may illustrate how an *EU Law of Administrative Procedure* could provide for more coherence, in order to avoid the disorientation that is due to be felt by citizens etc. who according to their own different activities, have to deal with different offices or agencies – or even with different institutions and bodies. The example of acknowledgement of receipt is probably one of the best in this respect.

Whereas almost all Member States' laws on administrative procedure include a provision according to which a public authority has the duty to deliver an acknowledgement of receipt for any request or any other form of formal communication it receives from a citizen, an economic operator or another legal person, no such duty is imposed in general terms by EU law.²⁴ Art. 14 of the *European Code on Acknowledgement of receipt and indication of the competent official*, deals with this lacuna in the following way. Paragraph 1 establishes the principle that *"Every letter or complaint to the Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period"*. Art. 14 (2) further gives indications about the content of the acknowledgement of receipt: *"The reply or acknowledgement of receipt shall indicate the name and the telephone number of the official who is dealing with the matter, as well as the service to which he or she belongs"*. Even though the duties thus imposed upon officials are not particularly heavy, Art. 14 (3) further foresees an exception in order to deal with abuses: *"No acknowledgement of receipt and no reply need be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character"*.

It must be stressed that the *Commission's Code of good administrative behaviour* does not contain any indication about an acknowledgment of receipt as such; the reason is that this *Code* indicates, in its section on 'correspondence' that *"A reply to a letter addressed to the Commission shall be sent within fifteen working days from the date of receipt of the letter by the responsible Commission department. The reply should identify the person responsible for the matter and state how he or she may be contacted"*. The problem regarding the absence of a particular indication on the acknowledgement of receipt is that it prompts officials to deal with a request when they start examining it on merit, whereas the function of an acknowledgement of receipt is different: i.e. it informs the citizen or economic operator that his/her communication has indeed been received, and what the following steps should be.

Going beyond this general obligation of an acknowledgement of receipt, some subject-specific or sector-specific practices or regulations give particular details on the content and effects of an the acknowledgement. So do Member States' laws. Of particular interest is the content of Art. 13 of Directive 2006/123 of 12 December 2006 on services, about authorisation procedures. The system of acknowledgment of receipt established by Art. 13 (5) of the directive for Member States' authorities is the following: *"All*

²⁴ The situation with acknowledgements of receipt sharply contrasts with rules about the duty to give reasons, for which there is a treaty provision in the TFEU (Art. 296), which was already present in the Treaty establishing the European Economic Community of 1957, and even in the Treaty establishing European Coal and Steel Community of 1951, i.e. at a time where there were extremely few systems of State administrative law which incorporated such a duty.

applications for authorisation shall be acknowledged as quickly as possible. The acknowledgement must specify the following: (a) the period [within which the application shall be processed]; (b) the available means of redress; (c) where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted". Furthermore art 13 (6) establishes that *"In the case of an incomplete application, the applicant shall be informed as quickly as possible of the need to supply any additional documentation, as well as of any possible effects on the period [within which the application shall be processed]"*. Although there are on the whole far fewer procedures where the Commission and other EU institutions etc. give formal authorizations than in the case of Member States' authorities, there are a number of situations where their action or inaction may have consequences that are comparable to those of procedures of authorizations in Member States. With such provisions on the acknowledgement of receipt an *EU Law of Administrative Procedure* would establish minimum standards that citizens and economic operators should be allowed to count upon when dealing with EU institutions etc. and it would put EU law on the same level of what is required by the Member States' authorities.

2.1.5 Providing a Common Template for New Policy Fields, Bodies, Services and Agencies

As indicated in Chapter 1, there are EU offices and agencies who refer to the *European Code of Good Administrative Behaviour*, or refer to that *Code* as the code they have adopted for their own use. This is however not generalised. Although the European Parliament has clearly endorsed the *European Code* that had been prepared by the *European Ombudsman*, by formally 'adopting' it in September 2001, there is no common feeling amongst European institutions etc. that this is the general code that applies to all of them. Many of the specific institutions' codes are presented and/or considered as a specific substitute to the *European Code*, rather than as a complement to a general code. Furthermore, as mentioned in Chapter 1, codes of good administrative behaviour are drafted mainly in view of their use by officials, whereas an *EU Law on Administrative Procedure* could and should be drafted mainly in view of clarifying the rights of citizens, economic operators, NGOs and other legal persons in their relationships with EU institutions etc.

A regulation being a legislative act adopted by the Parliament and the Council upon proposal of the Commission, it is normally bound to be considered as a general instrument, whether the issue is binding or not; this is particularly true in the case of major political institutions such as the European Parliament, the Council and the Commission. Furthermore, and unlike the *European Code*, an *EU Law of Administrative Procedure* in the form of a regulation would contain a number of provisions referring to further specifications that are or may be given in subject specific or sector specific regulations or in the internal regulations of institutions, bodies, offices and agencies. An *EU Law of Administrative Procedure* would therefore become a template for further elaboration in new subject specific or sector specific regulations or new offices' or agencies' internal regulations. This would foster more homogeneity in the presentation and wording of principles, rights and rules of administrative procedure.

2.2. Potential effects of the binding character of an EU law on administrative procedure

As already mentioned in section 2.1, an *EU Law of Administrative Procedure* has to be a 'regulation' in the sense of Art. 288, second sentence, TFUE, which establishes that "*It shall be binding in its entirety*". The binding character of a law, regulation directive or other type of instruments has a number of consequences.

Although non-binding documents or practices may have some legal effects, because judges might draw some consequences from the fact that an authority has not complied with rules of behaviour announced as guides for its future behaviour, only binding instruments necessarily have the following characteristics.

First, a binding text is mandatory for everybody – i.e. officials in charge of applying the law as well as citizens, economic operators, NGOs and other legal persons, and last but not least, courts – whereas a document of 'soft law', a 'code of good behaviour' a 'code of ethics' and the like may only be considered as having some kind of obligatory effect for the officials of the authority that established it. This is clearly illustrated by the *European Code*: even though the European Parliament has 'adopted' it, it is considered by many officials in the Commission, the Council and other EU bodies, offices and agencies as a document produced by the *European Ombudsman*, who has clearly no authority to create binding rules.

Second, being mandatory for everybody, a binding instrument has the capacity not only to establish obligations for officials, but also to establish rights for citizens etc. It should be mentioned that a binding instrument also has the capacity to establish rights for officials and public authorities, which have to be complied with by other public authorities, hierarchies within the authorities, and by citizens etc..

Third, a binding instrument may be the basis for a claim in court, unlike soft law. According to the principle of legal security, judges have the power and duty to apply binding instruments to a litigation that is submitted to them. A binding instrument must only be applied as far as it is relevant to a specific situation; however the general character of an *EU Law of Administrative Procedure* means that the rules contained in such a regulation would be automatically applicable to any situation involving interchange between citizens etc. and EU institutions etc. Only a deliberate provision providing for an exception would render the law inapplicable to a specific case. Vice-versa, subject specific or sector specific regulations are only binding for the cases which fall under their scope. Even though a court might draw inspiration from principles contained in one subject-specific or sector-specific regulation and apply a similar 'general principle of law' to another sector, there is no obligation for courts to do so. 'General principles of law' being expressed in court rulings, it is often difficult for specialised lawyers to predict to what extent they may be applicable to a given case; for other officials, for economic operators, NGOs and even more for citizens, it is hardly possible to make them aware of the existence of general principles of law, let alone of their content.

Fourth, not complying with a binding instrument may be the source of sanctions that a judge may decide. In the field of administrative action, there are two particularly important ways of sanctioning non-compliance. One is that a decision adopted by a public authority without complying with the law will be declared invalid by the court, and will therefore be deprived of legal consequences. This is an important guarantee for enforcement, because public authorities cannot accomplish their tasks if their acts are invalid. The second sanction is that if an illegal action has been made, the authority will be liable for the damages caused by its action (or inaction), and will have to repair the damages thus caused to a citizen etc. It is particularly important to understand that the efficacy of such sanctions lies far more in the fact that they act as a sword of Damocles than in their real use: EU institutions, bodies, offices and agencies have considerable political interest in wanting to avoid sanctions; in turn the desire to avoid sanctions is a stronger incentive for hierarchies to push their staff to take procedural rights seriously than the mere evocation of concepts such as 'service orientation'.

Furthermore, taking into account the multicultural context of the European Union, it must be stressed that in many countries, the binding character of law gives a higher profile to any instrument of the kind discussed here, as opposed to codes of good behaviour or codes of ethics. As far as officials are concerned, the British Civil Service has a longstanding tradition of non-binding 'codes' of particular importance. Indeed for very specific constitutional reasons²⁵ the British Civil Service very often applies non-binding codes in cases where public administration applies binding regulations in most other EU Member States; the same tradition applies also to Ireland and to some extent to Malta and Cyprus. But in other EU Member States the culture considers a binding law as far more important than non-binding documents, especially as far as the action of public authorities is concerned. Such cultural traditions affect the attitude of EU officials who have no experience of the specific British tradition, who will give more weight to binding instruments than to non-binding codes; this is true also for the documents which officials use in their daily work: if they have to apply guidelines that are the concrete embodiment of binding rules, they will be considered far more seriously than guidelines which simply indicate what is common practice. The same cultural traditions also apply to economic operators, NGOs, other legal persons, and to a large extent to citizens who have grown up in a similar cultural context.

The binding character of a regulation therefore provides a supplementary strength with respect to the existing *European Code*. A regulation establishing an *EU Law of Administrative Procedure* could have a series of positive consequences, which will be illustrated with a specific example, namely the duty to indicate remedies.

The indication of remedies is extremely important for a number of reasons. *First*, one cannot expect ordinary citizens, NGOs and economic operators to know that EU law provides for remedies nor how those are shaped. *Second*, remedies against decisions – or

²⁵ In a nutshell, the constitutional principle known as 'Royal prerogative' means that the executive is free to regulate the Civil Service without the necessity of a statute (a law adopted by Parliament); in turn this has led to a rather scarce use of binding regulations, contrary to what happens in European Continental countries or in the United States of America.

any kind of behaviour – by public authorities vary from one Member State to another as regards the existence and functioning of administrative appeals, judicial review, review of maladministration by an Ombudsman, etc.; there is therefore a risk of confusion in the public mind regarding both the availability and the nature of remedies for EU institutions etc., to which Member State’s law does not apply. *Third*, the availability of a remedy usually depends upon formal rules about the nature of the decision, activity or lack of action by a public authority, as well as deadlines for the introduction of a remedy. It often happens therefore that an ordinary citizen etc. becomes aware of the existence of a remedy when it is too late to make use of it. This is particularly true for court remedies, where there is no possibility to extend deadlines on request. *Fourth*, there are strict rules about the competence of Courts for remedies: as a rule, EU Courts are the only ones which have power to rule against EU institutions etc., whereas only Member States’ courts have that power for their own Member State’s public authorities. If a law suit is filed with an EU court instead of the competent Member State’s court – or vice versa – there is no mechanism available to transfer the case to the competent court. Worse, filing a case with a non-competent court does not interrupt the deadline for filing a case with the competent one: the deadline for filing a claim of annulment is two months after notification of the relevant decision at EU Court level, and there are similar deadlines at Member States’ levels. Missing a deadline will leave the citizens etc. without remedies to exercise.

Art. 19 of the *European Code*, on *Indication of possibilities of appeal* establishes that: “1. A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them. 2. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 263 and 228 of the TFEU”. This is a minimum rule that might be further developed. For instance, Art. 19 does not indicate that there are also remedies for the absence of any decision, such as the court procedure for failure to act established by Art. 265 TFEU.²⁶ Furthermore, some kind of indication about the fact that a remedy is available with the EU General Court or Civil Service Tribunal when the decision at stake is that of an EU institution should be complemented by the indication that remedies are available with the relevant Member State’s courts when the decision at stake is that of a Member State’s authority – as is most often the case with requests for infringement procedures.

²⁶ “Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.- The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.- Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion”.

As indicated earlier, the *European Ombudsman* uses the *European Code* for his/her review of maladministration; the sanctions of the lack of observation of Art. 19 derive from Art. 228 TFEU, and are therefore only effective if the office concerned cooperates with the Ombudsman. If there were a binding duty to indicate remedies, three more effective means of enforcement could derive from the relevant provision. First, the absence of indication of remedies might become a ground for annulling the relevant decision by EU Courts; this would probably depend upon the Court's appreciation of the importance of the relevant rule of procedure with respect to the decision itself. Second, even if the Court decided not to annul the decision at stake, there could be room for a compensation for the damages inflicted on a citizen etc. due to the fact that he/she was not able to use a remedy in due time. Third – and this is probably one of the most useful consequences of a duty to indicate reasons – the absence of indications on remedies could have the consequence of the calculation deadlines being interrupted, and starting only once it were established that the citizen etc. was aware of the deadline: it would therefore be advisable to foresee such a means of enforcement in the text of the regulation establishing an *EU Law of Administrative Procedure*.²⁷

The above explanation for the duty to indicate remedies could easily be transposed to provisions fleshing out the principle of consistency and legitimate expectations, that of impartiality of administrative decisions, to rules on time limits in administrative procedures, on the form of administrative decisions and to the duty to state reasons, as well as to rules on the initiation of administrative procedures, on the right to be heard, on the right to have access to one's file, and last but not least to rules on the efficiency and service and on impartiality.

It must be acknowledged that a binding EU Law on Administrative Procedure would not automatically have only positive consequences. Experience with different Member States shows that such laws usually have an impact on resources, as more time needs to be devoted to the observation of procedural rules. Furthermore, the rights of one citizen etc. might be in contradiction with those of other citizens etc.: typically, applying rules and principles on procedure may slow down decision-making. This was one of the grounds for reforms in public management introduced under the motto 'diminish red tape', or 'reduce bureaucracy'. In some Member States, such as Germany or Italy, this has also led to a reform of the law on administrative procedure, in order to accelerate decision-making. It must however be stressed that there have also been strong criticism in Member States against the number of those reforms, and that the most recent trends in public management reform – in a number of Member States, but also in the relevant sections of the OECD – have moved towards consolidating the rule of law and citizen's rights.

²⁷ We are leaving for specialists the discussion as to whether a regulation could in this way limit the provision of Art. 268 according to which "*the proceedings [...] shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*". At the end of the day it would be for the ECJ to decide, but at any rate, a clear indication from the EU legislator would not remain without consequences.

Experience in State public administration demonstrates overall that it is not the binding character as such of a law of administrative procedure that generates negative consequences, but the wording of the relevant provisions, and the general approach to the implementation of such a law, i.e. attitudes of officials and of the public, as well as information given by the media. Where officials take a very strict approach to the wording of rights in a law on administrative procedure, rather than trying to understand the concept involved and apply them to the cases they have to deal with, they tend to discuss the exact scope of the relevant legal provisions and try to reduce it as much as possible; vice-versa if members of the public insist on rights for the sake of the rights themselves rather than in view of what they want to achieve, they also tend to discuss the exact scope of the relevant legal provisions and try to enlarge it as much as possible. Such attitudes lead to litigation and in the end to overloading the courts with issues of formal interpretation. Furthermore, habits in legal wording may lead to drafting texts that appear only understandable to experts. Where provisions on administrative procedure are well worded, and if the right organisational and training efforts are being undertaken, experience shows that at the end of the day a law on administrative procedure not only has positive consequences on the rights of citizens, economic operators and other legal persons, but also contributes to more efficient and more effective public management.

One of the positive outcomes of a general law on administrative procedure is that it facilitates the smooth operating of staff mobility between different offices and authorities, as officials need not relearn operating routines almost from scratch, as happens when each office or authority has its own rules on administrative procedure. Needless to say, a general law of administrative procedure, if well worded, leaves the necessary space for adaptation in policy sectors or bodies where there is an objectively need for special procedures.

3. Potential effects of a general EU regulation on administrative procedure on Member States' administrations and legislation

Key findings

- At present, EU law has an influence on the administrative procedures in Member States only through a number of subject-specific or sector-specific directives or regulations that establish sector-specific procedures, and through the case law of the ECJ establishing the principles that limit the 'procedural autonomy' of Member States. A regulation establishing an EU Law on Administrative Procedure would also not change the state of the art in this respect.
- Composite procedures may be defined as procedures in which a final decision of EU institutions etc. are based upon a preparatory activity undertaken by Member States' authorities, or vice-versa; an EU Law on Administrative Procedure would not change the situation as regards the public authorities in Member States and the principle of subsidiarity would therefore be fully complied with. If well-worded, such an instrument might considerably improve the position of citizens etc. in composite procedures, as there would in any case be a number of minimal procedural guarantees to be applied by the EU institutions etc. in their part of the procedure.
- A spill-over effect in the field of administrative procedure has been experienced since the adoption of the *European Code of Good Administrative Behaviour*, which has become a model for some non-binding codes and even sometimes part of new laws and regulations on administrative procedure, in Member States, candidate States and beyond. The same might happen with an EU Law on Administrative Procedure, and this would highlight the positive role that the EU plays in developing the rights of citizens, economic operators, NGOs and other legal persons.

3.1. The absence of direct consequences of an EU law on administrative procedure on Member States' law and procedures

The Working Group on EU Administrative Law of the European Parliament's *Committee on Legal Affairs* clearly considers that Art. 298 TFEU can only constitute the basis for a regulation that would be only applicable to EU institutions, bodies, offices and agencies, and not to Member State's authorities. This view is shared by a majority of the relevant academic writings, and most specialists consider that any endeavour to proceed to an approximation of the provisions laid down by law, regulation or administrative action for administrative procedure would first need an amendment to the EU Treaties.

Practitioners and academics are accustomed to make a distinction between 'direct administration' on the one hand and 'indirect administration' on the other hand.

- 'Direct administration' may be defined as the execution of EU law and policies by the institutions, bodies, offices and agencies. Typical cases of 'direct administration' are, for instance, the adoption of antidumping measures in the field of trade with countries that are not EU members; or the application of competition rules and rules on state aids to economic operators in the Member States by the Commission; or the implementation of the EU framework programmes for research and technological development, where the Commission gives contracts, subsidies and grants to researchers, university departments, laboratories etc.
- 'Indirect administration', may be defined as the execution of EU law and policies by public authorities of the Member States: this is the case for ensuring free movement of persons, for the development and management of the internal market etc.
- When policies are implemented by Member States' authorities there is nevertheless an important activity of the Commission which in any case has to oversee the correct application of EU law by Member States; furthermore there are important policy sectors, such as telecommunications, energy, regional policy or to a great extent the common agricultural policy, where both EU institutions, bodies, offices and agencies have important administrative functions. That is why it has also become standard practice to speak of 'shared administration', or 'co-administration' in many policy sectors. What is important to understand is that in situations of 'direct administration' only EU law is applicable, and only the EU courts and the *European Ombudsman* or the EDPS may review its application on the basis of the relevant Regulations on access to documents and on data protection, and of the *European Code*. In situations of 'indirect administration', 'shared administration' or 'co-administration' both the Member States' law relevant to the organisation and functioning of public authorities and the EU law of the relevant policy field are applicable; the *European Ombudsman* or the EDPS have no power to review the operation of Member States' authorities - this is a power of the relevant Member States' Ombudsmen or Data Protection Supervisors, on the basis on the relevant national law as well as of Directive 95/46 on data protection. Both Member States' courts and EU courts may review the operation of Member States' authorities, with a specific coordination mechanism between them, i.e. the referral for preliminary ruling from a Member State's court to the ECJ in order to ask for the correct interpretation of EU law or the validity of an EU directive, regulation or decision.

At present, EU law has an influence on the administrative procedures in Member States in only two respects.

First, a number of subject-specific or sector-specific directives or regulations establish sector-specific procedures. This is the case for instance in the field of consumer protection, with rules about traceability of food, or in the field of telecommunications, with principles and rules about the way independent regulators influence pricing and so forth. Another example with a broader scope has already been mentioned in the present Assessment Note, i.e. Directive 2006/123 of 12 December 2006 on services in the internal market. A regulation establishing an EU Law on Administrative Procedure would not change the state of the art in this respect; there would be neither more, nor fewer special subject-specific or sector-specific administrative procedures due to the existence of such an EU Law.

Second, the European Court of Justice has established a set of minimum principles that impact upon administrative procedures in Member States whenever those procedures may have as a result impeding free movement of persons, goods, services and capitals, and more broadly impeding the good application of EU law, i.e. as stated by the Court in its Judgement of 15 October 1987 Heylens Case 222/86 that the decisions of Member States' authorities that may affect effective application of EU law have "to be made the subject of judicial proceedings in which its legality under [EU] law can be reviewed, and for the person concerned to ascertain the reasons for the decision".

The Court has also established the principles limiting the 'procedural autonomy' of Member States, i.e., for example, their freedom to establish administrative as well as judicial procedures when the application of EU law is at stake. The relevant case law of the Court, which started with a Judgment of the Court of 16 December 1976 Rewe-Zentralfinanz Case 33-76 establishes two principles: first, the principle of equivalence, according to which Member States if a given procedure is available for purely internal matters, the procedure be available for matters where the application of EU law is at stake must not lead to less favourable results, and second, the principle of effectiveness, according to which the procedures made available in Member State's law for the application of EU Law must not be deprived of effectiveness. These principles have indeed led to some adjustments in the judicial procedures systems of Member States for reviewing decisions where the application of EU law is at stake, and also sometimes in their systems of administrative procedure. As the principle of procedural autonomy is in no way based upon a comparison between the administrative procedure applicable in a Member State applicable to EU institutions, bodies, offices and agencies, a regulation establishing an EU Law on Administrative Procedure would also not change the state of the art in this respect.

A regulation establishing an EU Law on Administrative Procedure on the basis of Art. 298 TFEU would have the same scope as Regulation 1/58 on official and working languages or Regulation 45/2001 on data protection, which have no impact on Member States' authorities, unlike Directive 95/46 on data protection or the regulation that might replace it in the future, which will in any case remain different from the regulation applying to EU institutions etc.

The only mentions of Member States' authorities that might appear in a regulation based upon Art. 298 TFEU would be provisions for dealing with 'composite procedures'.

3.2. Impact on composite procedures

Composite procedures may be defined as procedures in which a final decision of EU institutions etc. are based upon a preparatory activity undertaken by Member States' authorities, or vice-versa.

Many of these composite procedures are the result of subject specific or sector specific directives or regulations, which define in more or less detail the exact roles and rules to be applied by EU institutions and Member State's authorities. This is the case, amongst many others, in the fields of food safety, of the admission on the market of new chemicals or telecommunications.

A regulation establishing an EU Law on Administrative Procedure on the basis of Art. 298 TFEU would not change the situation regarding the public authorities in Member States, who would still be bound only by the relevant subject-specific or sector-specific directives and regulations and by the boundaries set up by the ECJ's case law on 'procedural autonomy'. The principle of subsidiarity would therefore be fully complied with.

An EU Law on Administrative Procedure, if well worded, might improve considerably the position of citizen's etc. in composite procedures, as there would in any case be a number of minimal procedural guarantees to be applied by the EU institutions etc. in their part of the procedure. The correct application of these guarantees by EU institutions etc. could be reviewed by the EU Courts, the *European Ombudsman* and EDPS.. Furthermore, in reviewing the activity of their authorities in the procedure, Member States' courts might refer to the ECJ in order to know whether the procedural guarantees had previously been complied with by EU institutions etc. Such a referral might lead to a Member State's court eventually deciding to annul a decision of a Member State's public authority that it has to control due to the fact that the decision was the outcome of a procedure where the ECJ has ruled that EU institutions etc. have not correctly applied the EU Law on Administrative Procedure.

It would be useful if a regulation establishing an EU Law on Administrative Procedure on the basis of Art. 298 TFEU contained specific provisions about composite procedures. It may be recalled that Regulation 1049/2001 on access to documents contains a specific provision for documents which are being asked from EU institutions etc. i.e. Art. 5 on 'Documents in the Member States', according to which "*Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation. The Member State may instead refer the request to the institution*". True, there have been a number of criticisms of that provision, due to its wording, but at any rate it demonstrates that it is possible to comply with the consequences of the principle of

conferral and the principle of subsidiarity, which regulate the distribution and use of competences between the EU and Member States, and which are solemnly recalled by arts. 4 and 5 TEU.

3.3. Spill-over effect

In order to examine all the possible Consequences of an EU Law on Administrative Procedure on Member State's Law and Procedures it is important to say a few words about the possible spill-over effect of such a regulation.

The literature on the EU uses the concept of 'spill-over effect' (defined in some dictionaries as "A side effect arising from or as if from an unpredicted source")²⁸ – as do practitioners to a large extent– in order to describe the approximation of laws and practices resulting from changes which EU Member States adopt on a voluntary basis, in order to improve their legislation and practices and to facilitate communication and free movement between the public authorities as well as citizens etc. of the Member States.

This spill-over effect in the field of administrative procedure has been experienced since the adoption of the *European Code of Good Administrative Behaviour*, which has become a model for some non-binding codes and even sometimes parts of new laws and regulations on administrative procedure, in Member States, candidate States and beyond. This spill over has been facilitated by the setting up and operation of the *European Network of Ombudsmen*.²⁹

At first an EU Law on Administrative Procedure would mainly serve to upgrade the relevant EU law to the level attained in the Member States which have the best laws on administrative procedure. The mere fact of adopting such an EU Law could soon have a positive effect also in Member States where the discussion about the need and usefulness of such a law is still ongoing. For instance, in France, the *Commission supérieure de codification*, after having renounced trying to establish a Code of public administration, decided in June 2012 to resume work on the feasibility of a codification of administrative procedure; indeed there are contradictory views about such a law, which some consider as unnecessary since the corresponding rights are already guaranteed by the case-law of administrative courts and that case law is more suitable for innovation than a written statute, whereas others argue that legal certainty would only be fully guaranteed by a statute establishing a law on administrative procedure. Later, this EU Law, if well-worded, and with the help of positive developments in the ECJ's case law, might have positive spill-over effects in all EU Member States, in fostering relevant amendments to existing legislation, and the adoption of new legislation.

²⁸ *The American Heritage Dictionary of the English Language*, Fourth Edition, 2009, cited on <http://www.thefreedictionary.com/spillover>, consulted on 10/07/2012.

²⁹ See <http://www.ombudsman.europa.eu/resources/statement.faces> last consulted on 10/07/2012.

This is not an unknown phenomenon: to quote only one example, it may be recalled that the Treaty establishing the European Coal and Steel Community, signed in Paris on 18 April 1951, contained a provision making it mandatory for the High Authority (the predecessor of the European Commission) to give reasons for the decisions it adopted if those could negatively impact upon an economic operator. At that time, while it was a common rule that Courts should spell out the grounds or reasons for their rulings, there was no similar rule in the Member States for decisions of public administration. Thirty years later, most EC Member States had adopted some rules or principles about giving grounds for administrative decisions. When the European Court of Justice ruled on the *Heylens Case* 222/86 in 1987, it had become obvious that such rules were necessary not only in the framework of the internal market, but also for purely internal matters dealt with by the authorities of the Member States.

Positive spill-over effects of EU legislation have the advantage that they may highlight the positive role that the EU plays in developing the rights of citizens, economic operators, NGOs and other legal persons. This has to be borne in mind when choosing the wording of an EU Law on Public Administration. If precise enough but also written in a commonly accessible language, there are good chances that such an EU regulation may develop positive spill-over effects for the benefit of all Member States.

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**Aspects relating to the efficiency
of the EU administration**

**Research paper
by Blomeyer & Sanz**

DRAFT

AUTHOR

This study has been written by **Blomeyer & Sanz** at the request of the European Added Value Unit, of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Internal Policies (DG IPOL) of the General Secretariat of the European Parliament.

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List of Abbreviations

DG Directorate General

EC European Commission

ECJ European Court of Justice

EP European Parliament

EU European Union

TFEU Treaty on the Functioning of the European Union

Executive summary

1. Introduction

The introduction presents the assessment's objectives (Section 1.1), introduces the content and structure of this report (Section 1.2), and briefly notes a series of methodological considerations (Section 1.3).

1.1 Objectives

In the words of the technical specifications for this assessment, *'The purpose of the assessment will be to assess the potential effects, in terms of efficiency gains (better service, ideally at a lower cost) on the EU administration of the introduction of a general Law of Administrative Procedure for the EU, based on Article 298 TFEU, and limited to the direct administration of the Union'*.

The assessment is conducted in the framework of discussions surrounding the Treaty of Lisbon's mandate to ensure 'open, efficient and independent administration' (Article 298, Treaty on the Functioning of the European Union) and the Charter of Fundamental Rights' provisions on the right to good administration (Article 41). Moreover the assessment considers the existing work carried out by the Working Group on Administrative Procedure, established by the European Parliament's (EP) Legal Affairs Committee, with the involvement of the Committees on Constitutional Affairs and Budget.

The assessment intends to add value to the existing work by adopting a pragmatic approach, i.e. the elaboration of a comprehensive 'catalogue' of potential effects and related illustration. Indeed, most of the existing EP briefing notes and studies have adopted a more theoretical approach in justifying the requirement for a general law on administrative procedure, with only limited references to the actual performance of the general laws in the Member States.¹

Fehling explains the conceptual framework for our focus on effectiveness. This focus is in line with 'New Administrative Science'.² This *'advocates a broader frame of reference that includes the changes in reality that Administrative Law and its application intend to bring about'*. In Germany this is considered as the 'guiding function' of general administrative law, stepping beyond purely legal considerations and including political, sociological and economic aspects.³

¹ Following the kick-off meeting with the EP, the EP facilitated references for 23 briefing notes / studies prepared during 2010-2012.

² The German term is 'Neue Verwaltungsrechtswissenschaft', a term coined by Andreas Voßkuhle in 2006. See Andreas Voßkuhle, *Neue Verwaltungsrechtswissenschaft*, in Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, Band I, 2006

³ The German term is 'Steuerungsperspektive' or 'Steuerungsfunktion', Michael Fehling, *Comparative Administrative Law and Administrative Procedure*, Annual Report - 2011 - Germany, in IUS Publicum Network Review, October 2011, page 5

1.2 Content and structure

This interim report presents progress with the delivery of the assessment as of 24 September 2012. The EP notified the contract award for this study on 16 July 2012; the kick-off meeting was conducted on 19 July 2012; a progress note was presented on 3 September 2012 and discussed with the EP on 5 September 2012.

Further to the introduction (Section 1), this report comprises two main sections: Section 2 presents a 'catalogue' of the potential effects that can be expected to derive from enacting a general law on administrative procedure at the EU level; Section 3 provides an in-depth illustration of a selection of the effects in the form of Member State case studies.

1.3 Methodological considerations

This section notes a series of methodological considerations in relation to the catalogue of potential effects (1.3.1) and the case studies (1.3.2).

1.3.1 Catalogue of potential effects

The elaboration of the catalogue of potential effects is based on a combination of desk research and survey work.

Desk research: The catalogue of potential effects draws on a review of concrete Member State experiences with implementing codified general laws on administrative procedure (focus on the effectiveness of the general laws). Desk research focuses on a review of recent academic literature on the effects of general laws on administrative procedure in the Member States.

Survey work: Moreover, the contractor has conducted a validation exercise, in the form of a survey addressed to academic experts and Ombudsman institutions in the Member States. Academic experts are from university faculties for law, administrative and political sciences with a specific research interest in codified general laws on administrative procedure. Ombudsman institutions cover the national and regional levels. The survey asked for a confirmation of the extent of 'materialisation' of the different effects in the Member States, and also reviewed support for the enacting of a general law on administrative procedure at the level of the EU institutions.⁴ The survey was launched on 11 September, with a first deadline for responding by 20 September 2012 and two reminders with deadlines for 20 and 28 September. The survey was addressed to a total of 185 institutions, comprising 119 Universities (faculties for law,

⁴ The survey work built on the experience of the recent International Academy of Comparative Law, Codification-Congress (24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx), involving a survey on the history and content of general law on administrative procedures in different countries including a series of Member States. Our survey adds to this by focussing more on the actual experience with general law on administrative procedure (effectiveness).

public administration sciences and political sciences) and 66 Ombudsman institutions (national and regional) in all Member States. With about 30% (56 responses, 24 September), the rate of response is considered satisfactory.⁵ The following figure shows the survey respondents by category.

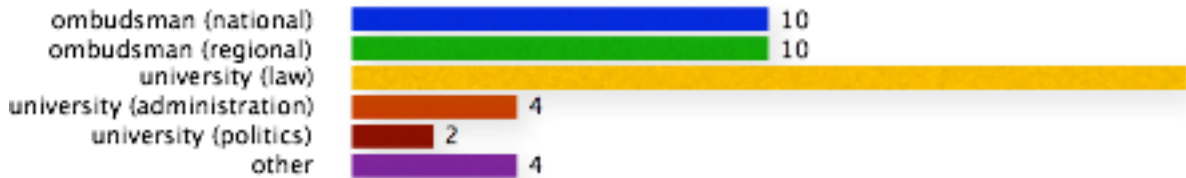
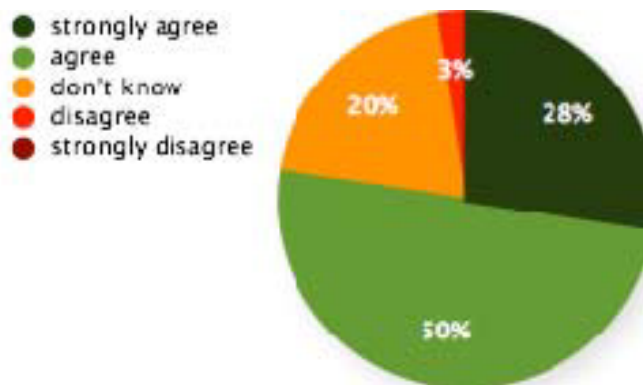


Figure 1 - Survey respondents (number of respondents per category)

Section 2 provides detailed survey feedback concerning the different types of efficiency / effectiveness benefits deriving from a general law on administrative procedure. However, at this stage it is worth showing the overall support among academics and Ombudsman institutions with regard to enacting a general law on administrative procedure at the level of the EU institutions, bodies, offices and agencies. Indeed, the figure below shows that 78% of survey respondents agree that such a general law would bring about benefits similar to those experienced in the Member States.

Figure 2 - We consider that a general law on administrative procedure at the level of the EU institutions would bring about benefits similar to those experienced in the Member States (response, percent).



Please note that survey feedback in this report will be updated after the final deadline of 28 September. This will also include the review of the narrative survey feedback (respondent responses in text boxes, e.g. examples, references etc.). If relevant, the survey feedback can also be analysed by type of respondent or Member State.

⁵ Survey responses cover the following Member States: AT, BE, BG, CY, DE, DK, EE, ES, FI, GR, HU, IT, LV, NL, PL, PT, RO, SE, SI, SK, UK. In addition, responses were received from CH and NO.

1.3.2 Case studies

This section notes a series of methodological considerations with regard to the case studies.

Expected results: The case studies are expected to provide a concrete illustration of a selection of different benefits that have derived from the enactment of codified general laws on administrative procedure in the Member States. The positive Member State experiences intend to serve as inspiration to the EP and the European Commission (EC).

Quantification: Moreover, the case studies are expected to provide quantitative evidence for the benefits of a general law on administrative procedure. Our desk research to date confirms that whilst there is a wealth of experience in the Member States demonstrating the effectiveness of general law on administrative procedure, these benefits are presented in qualitative terms with no reference to quantitative benefits (e.g. budget savings, reduced volume of litigation etc.). Indeed, whilst some of the literature refers to quantitative benefits (e.g. reduced volume of litigation), there is no quantification with detailed numbers (e.g. the number of cases per year).

Survey feedback confirms the limited empirical evidence with regard to the efficiency / effectiveness of general law on administrative procedure. Indeed, several survey respondents explicitly refer to the lack of empirical evidence in their Member State (e.g. a survey respondent from Finland notes limited information concerning the volume of the number of complaints (in front of administration), Ombudsman cases, litigation at courts, or on resource efficiencies thanks to best practice exchanges between administrations operating the same general law).⁶

In our understanding, the absence of any attempts to quantify the benefits can be explained with methodological constraints in measuring immaterial benefits (e.g. how to measure and 'monetise' enhanced legal security?). Whilst quantitative tools used in regulatory impact assessments such as the standard-cost-model could be applied to measure the costs of current deficiencies (e.g. the cost of European Court of Justice or Ombudsman cases related to different areas of administrative law) it is not considered possible to make comprehensive predictions on possible cost savings implied by a general law on administrative procedure. Indeed, it can not be known to which extent a general law on administrative procedure would reduce the volume of litigation.

Notwithstanding the methodological constraints, the case studies attempt to quantify the costs of current deficiencies that can be related to the absence of a general law (e.g. cost of European Court of Justice and Ombudsman cases related to areas of general

⁶ Similar feedback is provided by survey respondents from Slovenia, Denmark ('I suspect this to be true (budget savings), but I have no scientific evidence to support this theory'), Italy (no empirical evidence on court litigation), Greece, Slovakia,

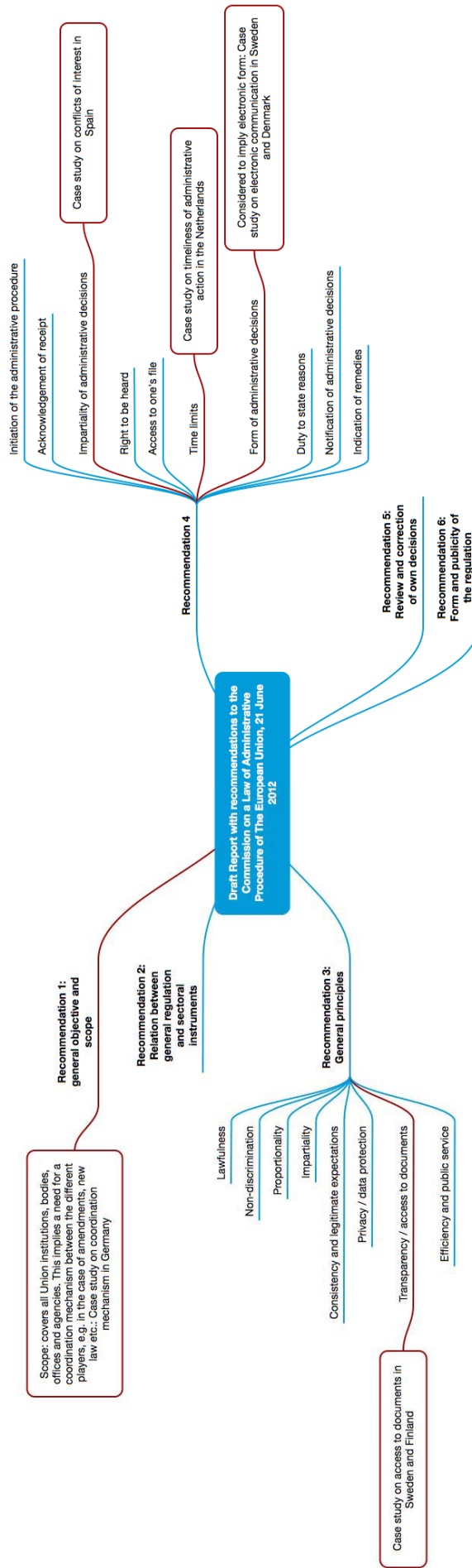
administrative law).⁷ This quantification is presented in the context of the introductions to the case studies, when describing the current situation at EU level. The outcomes of the quantification can be considered as potential cost savings of a general law on administrative procedure.

Selection of case studies - thematic scope: Concerning the thematic scope of the case studies, our focus is on the areas covered by the EP's Draft Report on this subject.⁸ The following figure presents the thematic areas covered by the EP's Draft Report, and shows the selected case study areas (red boxes).

⁷ The calculation of costs can draw on existing research into the cost of court cases in the Member States. See: Hoche, Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, EC DG Justice, Freedom and Security, December 2007

⁸ European Parliament, Committee on Legal Affairs, Draft Report with recommendations to the Commission on a Law of Administrative Procedure of the European Union, 21 June 2012

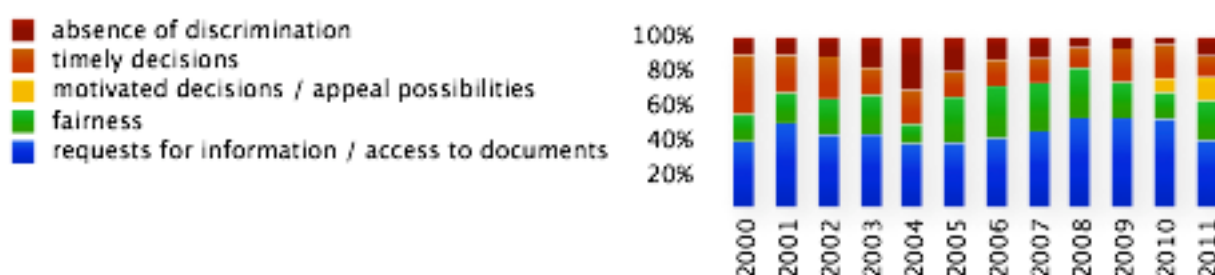
Figure 3 - EP Draft Report - analysis of thematic coverage and proposed case studies (red boxes)



The thematic coverage of the case studies is also guided by information on specific deficiencies in the functioning of the EC, and that can be related to the absence of a general law on administrative procedure at the EU level. For example, European Court of Justice (ECJ) statistics point to the important number of cases related to access to documentation, e.g. General Court completed cases (judgements and orders) show seven cases in 2007, 15 in 2008, six in 2009, 21 in 2010 and 23 in 2011.⁹

Similarly, EU Ombudsman statistics point to deficiencies in a series of areas that are covered by the EP Draft Report, and that we have selected for the case studies (e.g. timeliness of administrative decisions, access to documents).

Figure 4 - Ombudsman statistics on alleged maladministration (percentage of cases in selected areas of administrative law)¹⁰



Selection of case studies - geographic scope: Concerning the geographic scope, we focus on the Member States with comparatively more established general laws on administrative procedures.

Our review of administrative law in the Member States shows that 20 out of 27 Member States have enacted a general law on administrative procedure (one further Member State, i.e. Malta, is in the process of enacting a general law on administrative procedure).

A series of Member States have enacted general laws on administrative procedures in the 80s (and earlier) or early 90s, and our literature review confirms the overall effectiveness (in qualitative terms) of the laws in these Member States.

However, only limited information is available for the Member States that have enacted such legislation more recently. In general terms, this applies mainly to the ‘new’ Member States, for example, the Czech Republic: *‘There have been no doubts that the regulation is effective and proper; however, more time is needed to assess the Code and its application as a whole’*.¹¹ It is also worth noting that legislation in the ‘new’ Member States was often

⁹ European Court of Justice, Annual Report 2011, 2012, page 199

¹⁰ European Ombudsman, Annual Reports for 2010, 2011

¹¹ Josef Stasa, Codification of Administrative Procedure, National Report Czech Republic, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 11.

inspired by legislation in 'old' Member States, e.g. Estonia's Administrative Procedure Act is based on the German model and inspired by experience from Scandinavia.¹²

The following table shows the existence of codified general laws on administrative procedure in the Member States, highlighting Member States with particularly well established laws, and where our desk research has confirmed the existence of empirical information on the effectiveness of the general laws.¹³

Note that we are currently considering the preparation of a case study on the United Kingdom as there might be parallels with the situation at EU level, e.g. the absence of a general law causing resource inefficiencies.

¹² Ivo Pilving, Codification of Administrative Procedure, National Report Estonia, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 4.

¹³ Source: The table has been prepared by Blomeyer & Sanz on the basis of a review of the general laws on administrative procedure in the EU Member States. Member States that have not enacted a general law are highlighted in red colour; Member States with general law that still needs to be reviewed by the study team are highlighted in grey colour. The Member States selected for the case studies are highlighted in green colour.

We propose to further elaborate the table with an overview of the alignment of the situation in the Member States with the proposed thematic coverage set out in the EP Draft Report

Concerning the initially proposed case studies in IT and FR (the other proposed Member States are ES, DE and SE), our desk research suggests that it would be better to focus on other Member States for the following reasons:

- Research on Italy's general law on administrative procedure suggests that there is limited experience concerning effectiveness to date, i.e. it is unlikely that a case study on Italy will produce insights of use to the present study. See Diana-Urania Galetta, Das Verwaltungsverfahrensgesetz im europäischen Kontext: Der Fall Italiens, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 155.
- Concerning France, it appears that the initial plans (Committee on Codification / Commission supérieure de Codification, 1996) for a codification of general administrative law were dropped in 2006 due to changed political priorities, and the perceived complication of codifying general administrative law. However, it does not seem that there have been any dedicated discussions concerning the advantages / disadvantages of enacting a general law on administrative procedure. We therefore consider that a case study on the situation in France is unlikely to benefit the present study in terms of shedding additional light on the advantages of enacting a general law on administrative procedure. See Jacques Ziller, Die Entwicklung des Verwaltungsverfahrenrechts in Frankreich, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, pages 142-143.

Table 1 - General law on administrative procedure in the Member States

Member State	Date	General Principles	Initiation of the administrative procedure	Acknowledgement of receipt	Impartiality	Right to be heard	Access to one's file	Time limits	Form of administrative decisions	Duty to state reasons	Notification	Indication of remedies
AT	1991*											
BE												
BG	2006											
CY	1999											
CZ	2004											
DE	1976											
DK	1985											
EE	2001											
EL	1999											
ES	1992											
FI	1982											
FR												
HU	2004											
IE												
IT	1990											
LT	2006											
LU												
LV	2001											
MT**												
NL	1992											
PL	1960											
PT	1991											
RO												
SE	1986											
SI	1999											
SK	1967											
UK												

*Reforming the earlier law of 1925

**Malta is in the process of enacting a general law on administrative procedure

2. Catalogue of potential effects

This section presents the catalogue of potential effects, drawing on concrete Member State experiences with the effectiveness of codified general laws on administrative procedure.

The order of presentation of the potential benefits is as follows:

- 2.1 Enhanced legal security
- 2.2 Enhanced legal and policy consistency
- 2.3 Enhanced compatibility between Member State and EU law
- 2.4 Reduced burden - administrators, lawyers and judges
- 2.5 Contribution to legal research / best practice exchange

The discussion of every single potential effect is dealt with in two separate sub-sections, covering two main aspects:

- on the one hand, the Member State experience with effectiveness;
- and on the other, the implications for the EU institutions, bodies, offices and agencies.

2.1 Enhanced legal security

2.1.1 Member State experience with effectiveness

Legal security - protection of individual rights: Experience from the Member States that have enacted a general law on administrative procedure confirms positive effects vis-à-vis the protection of individual rights. For example, experience from Portugal shows that the introduction of general administrative law has enhanced the '*rationality of public choices*' and increased the protection of individual rights.¹⁴ This is also confirmed for Switzerland: '*codification clarified the legal regime, extended the realm of legal certainty, and thus improved the status of individuals in their relationship with the administration*'.¹⁵ Research in Italy considers that the Italian Administrative Procedures Act has strengthened procedural protection,¹⁶ and confirms overall effectiveness: '*the importance of this Act may not be overlooked. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field. It raised, more than any other piece of legislation, questions for academics and practicing lawyers*'.¹⁷

¹⁴ Joao Martins Claro, Administrative procedure - the Portuguese case, 2006

¹⁵ Thierry Tanquerel, Codification of administrative procedure in Switzerland, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 14

¹⁶ Giacinto della Cananea, The Italian Administrative Procedure Act: Progress and Problems, Annual Report 2010 - Italy, in IUS Publicum Network Review, November 2011, page 2

¹⁷ Giacinto della Cananea, The Italian Administrative Procedure Act: Progress and Problems, Annual Report 2010 - Italy, in IUS Publicum Network Review, November 2011, page 17

Legal security - legality / interpretation by the courts: Experience from Germany suggests that a codified general law on administrative procedure reduces the need for (at times, contradictory) interpretation (by the courts) thus strengthening legal security.¹⁸

Legal security - de-regulation: A general law on administrative procedure can contribute to reduce the 'volume' of legislation, e.g. by deleting general administrative law provisions in sector-specific laws (the latter could refer to the general law, unless specific administrative provisions are required that are going beyond the general law).¹⁹

Member State experience points to the increasing volume of administrative law and the number of regulatory 'authors' leading to increasing complexity as one of the motivations behind the codification of general law on administrative procedure. This is a general experience in most Member States with a steep increase in the number of laws following World War II, e.g. with the introduction of welfare legislation. The Dutch legislator has addressed this by adopting its General Administrative Law in 1994:²⁰ *'The impact of this Act on Dutch administrative law has therefore been great; some have even called it a cultural revolution in the field of administrative law. Where previously those seeking general concepts and principles of administrative law had to explore a patchwork of special branches of law, special laws and case law of special administrative courts, the GALA, with its basic definitions and general rules, now provides some structure. As a result, administrative law has become far more accessible; the academic debate can now be held on the basis of unequivocal concepts; case law in one specific branch of law may now be relevant to another branch of law; and the various highest administrative courts in the Netherlands have started to consult each other's case law. To this extent, the GALA has triggered a process leading towards greater uniformity.'*²¹ Moreover, experience from The Netherlands shows that a general administrative law can have a strong harmonisation effect vis-a-vis the preparation of new administrative law and the application of administrative law: *'These key definitions have had a major harmonising effect, because they apply to the full range of administrative law. Whenever a special law empowers any administrative authority to issue an order, it is required, when exercising such powers, to comply with the GALA rules'*.²²

Similar experience is reported for Finland: *'Before the first codification of administrative procedure was enacted in 1982, it was difficult to give a consistent picture of the legal order in the field of administrative procedure. There were a lot of specific provisions on different matters of administrative procedure in various acts and decrees applicable in certain authorities or applicable*

¹⁸ Hans-Jörg Birk, Wahrnehmung und Bedeutung des Verwaltungsverfahrenrechts aus anwaltlicher Sicht, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, pages 46-47

¹⁹ Hans-Jörg Birk, Wahrnehmung und Bedeutung des Verwaltungsverfahrenrechts aus anwaltlicher Sicht, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 47

²⁰ Tom Barkhuysen and Willemien Ouden, in Ymre Schuurmans, The Law on Administrative Procedures in the Netherlands, Netherlands Administrative Law Library, April-June 2012, page 2

²¹ Tom Barkhuysen and Willemien Ouden, in Ymre Schuurmans, The Law on Administrative Procedures in the Netherlands, Netherlands Administrative Law Library, April-June 2012, page 12

²² Tom Barkhuysen and Willemien Ouden, in Ymre Schuurmans, The Law on Administrative Procedures in the Netherlands, Netherlands Administrative Law Library, April-June 2012, page 9

*when given pieces of material legislation were applied. As a whole, the legislation was very fragmental. Were procedural questions not regulated, public authorities had developed their own practices which were built on general principles of administrative law and discretion of civil servants’.*²³

The motivation behind enacting a general law on administrative procedure in Germany in the early 1970s was to enhance clarity, considering that the existing situation complicated the work of administrators and made it impossible for citizens to understand the legal situation.²⁴ German experience demonstrates the success of the general law on administrative procedure in terms of ensuring uniformity in new legislation: ‘...compels the legislator at least to justify explicitly any deviance from its procedural model’.²⁵ Moreover, the German experience suggests that a general law on administrative procedure reduces the need for sector-specific legislation to deal with general procedural issues and contributes to de-regulation.²⁶ Indeed, research in Germany shows potential for additional de-regulation / codification as several different sector-specific laws contain similar general provisions on administrative procedure.²⁷ In this context, the ongoing codification of general law on administrative procedure allows to rationalise historically grown differences in detail (in sector-specific law).²⁸

Legal security - competitiveness: There are also important implications for competitiveness. Research in Germany points to a contribution of general law on administrative procedure to competitiveness, e.g. investors would be scared off by differences in administrative law between different German regions.²⁹ This argument also applies to the EU level: ‘the rivalry among the member states to encourage business activities urges for more efficient administrative procedures in economic regulation as well’ and

²³ Outi Suviranta, Codification of administrative procedure in Finland, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 5

²⁴ Ulrich Stelkens, Kodifikationssinn, Kodifikationseignung und Kodifikationsgefahren, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 273

²⁵ Jens-Peter Schneider, Codification of administrative procedure in Germany, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 16

²⁶ Jan Ziekow, Governance des Verwaltungsverfahrens, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 101; and Wolfgang Kahl, Entwicklung des Rechts der EU und der Rechtsprechung des EuGH, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, pages 130-131

²⁷ Martin Burgi, Reform der Eröffnungskontrollen und des förmlichen Verfahrens I, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, pages 221-222

²⁸ Wolfgang Durner, Reform der Eröffnungskontrollen und des förmlichen Verfahrens II, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 241

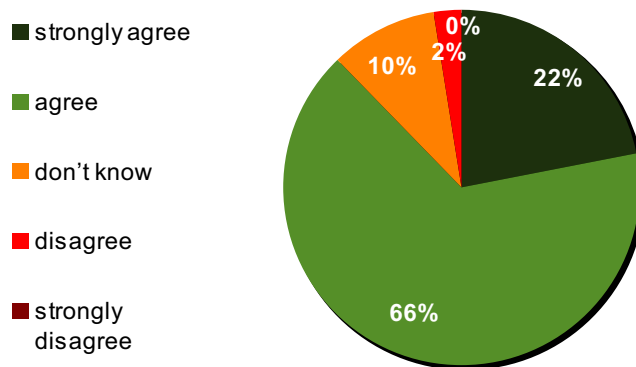
²⁹ Heribert Schmitz, Simultangesetzgebung von Bund und Ländern, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, pages 259-260

'economic integration raises the number and frequency of transnational administrative procedures'.³⁰

The following pages show survey feedback on enhanced legal security by 24 September 2012.

Some 88% of all survey respondents consider that the general law on administrative procedure has contributed to enhance the reputation of government / public administration as clearer rules / codification contribute to legitimacy. 87% of survey respondents agree that a general law enhances legality as rules are 'made' by the legislator and not the courts. 47% of survey respondents also consider that a general law contributes to de-regulation, however, 37% of survey respondents disagree on this. Finally, 77% of survey respondents consider that a general law contributes to rationalisation / harmonisation as the general law triggers more harmonised provisions in sector-specific law.

Figure 5 - Our general law on administrative procedure has contributed to enhance the reputation of government / public administration as clearer rules / codification contribute to legitimacy.



³⁰ Michael Fehling, Comparative Administrative Law and Administrative Procedure, Annual Report - 2011 - Germany, in IUS Publicum Network Review, October 2011, page 2

Figure 6 - Our general law on administrative procedure has contributed to enhance legality as procedures are legislated and are not 'made' by the courts.

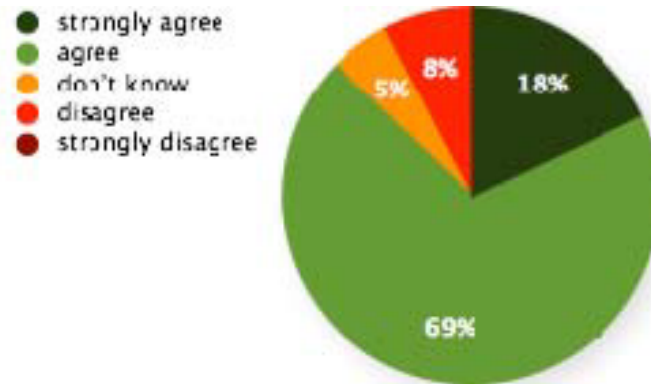


Figure 7 - Our general law on administrative procedure has contributed to deregulation as general provisions on administrative procedure are no longer required in sector-specific legislation.

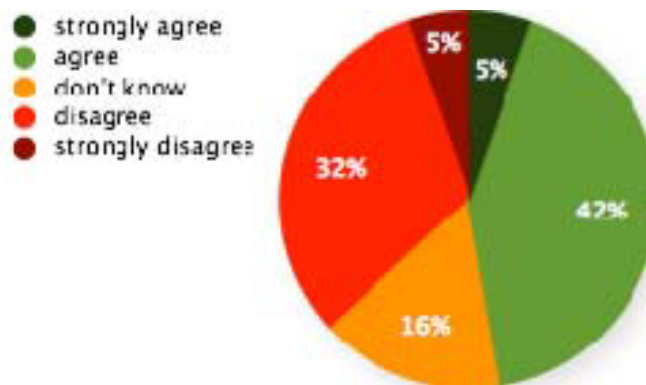
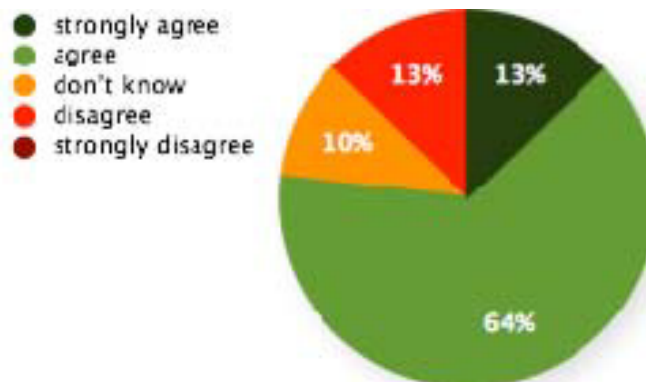


Figure 8 - Our general law on administrative procedure has contributed to harmonisation / rationalisation as the general provisions have triggered harmonised provisions in sector-specific law.



2.1.2 Implications for the EU institutions, bodies, offices and agencies

Looking at the implications for the EU institutions, bodies, offices and agencies, we consider that a general law on administrative procedure would lead to efficiency / effectiveness gains similar to those experienced by the Member States. This is valid for the four issues discussed under the wider framework of 'enhanced legal security', i.e. the protection of individual rights, interpretation by the courts / legality, de-regulation and competitiveness.

Legal security - protection of individual rights: Both, natural and legal persons dealing directly with the EU administration would benefit from a general law on administrative procedure as their rights would be set out in one piece of legislation. Whilst sector-specific law might set out more far-reaching protection, the general law would set the minimum standards applicable to any interaction between the EU administration and a natural or legal person. Indeed, as noted in the EP's Draft Report, the general law would act as a 'de minimis rule' ensuring that *'The guarantees afforded to persons in sectoral instruments (...) never provide less protection than those provided for in the regulation'* (Recommendation 2, EP Draft Report).

Legal security - legality / interpretation by the courts: A general law on administrative procedure would enhance 'legality': *'...today we can see that European administrative law is mainly advancing with the help of the European Court of Justice and the European Court of First Instance. According to some, this is a natural and healthy development. However, to others it would be more legitimate if the relevant legislator of the European Union advanced the development of procedural law in this area'*.³¹

Legal security - de-regulation: Section 2.1.1 has noted how Member State experience with an increasing volume of legislation has motivated the Member States to codify general law on administrative procedure. There are clear parallels between the Member State and the EU experience. The latter is also experiencing a rapidly increasing volume of legislation - partly related to the growing transfer of competences from the Member State to the EU level. Similarly, codification at the EU level can be expected to lead to efficiency and effectiveness gains via de-regulation. Indeed, a codified general law on administrative procedure would make EU legislation clearer and thus more effective in terms of its application. This in turn implies a series of efficiency gains as clearer legislation would require less effort on behalf of the EU administration in terms of applying administrative law. Moreover, there are likely to be efficiency gains in terms of the reduced need for different EU institutions, bodies, offices and agencies elaborating separate pieces of general law on administrative procedure. Instead, the different actors could simply refer to the general law (unless more far reaching protection is required). In this context it is worth emphasising the growing number of potential 'legislators' at the

³¹ Statskontoret, Principles of good administration in the Member States of the European Union, 2005, page 77

EU level. For example, the number of EU agencies has grown significantly in recent years, from the first agencies set up in the late 70s to 44 agencies listed in 2012.³² (

Legal security - competitiveness: A general law on administrative procedure at the EU level can also be expected to derive in substantial benefits in terms of the enhanced competitiveness of the EU at the global level. Indeed, just as at the level of the Member States (between and within), a general law would facilitate the EU administration's interaction with industry from Third Countries thus enhancing the attractiveness of the EU as a market place (in this context it would be interesting to explore research on the United States' 1946 Administrative Procedures Act).

Finally, the introduction of a general law on administrative procedure at the EU level might motivate the (six) Member States that have not yet adopted such a law to follow the EU example, i.e. there is a potential for the EU to contribute to enhancing legal security in the concerned Member States. This consideration is based on the experience with the influence of EU on Member State law. For example, in Germany, the influence of European administrative law on national administrative law was already established as far back as the 70s, with exhaustive analysis of this phenomenon provided by Jürgen Schwarze in 2005.³³ The influence is particularly pronounced with regard to administrative law provisions in the areas of the environment and public procurement. Note for example the ECJ Case 115/09 of 12 May 2011 'Trianel case', with the ECJ declaring that '*German legislation precluding access to administrative courts of non-governmental organisations in the environmental sector was incompatible with the relevant legislation at EU level*', and thus triggering legislative change in Germany.³⁴

2.2 Enhanced legal and policy consistency

2.2.1 Member State experience with effectiveness

Experience in Germany suggests that a general law on administrative procedure has a 'guidance' and 'leadership' function, i.e. innovations (e.g. eGovernment) are first 'tested' at the level of the general law on administrative procedure, and then further elaborated / articulated in sector-specific law. Neglecting this function leads to inconsistencies between different areas of sector-specific legislation.³⁵ Indeed, in Germany there are cases of sector-specific laws regulating similar 'scenarios' in different ways and adopting

³² See http://europa.eu/agencies/index_en.htm: 35 decentralised agencies, 6 executive agencies, 2 EURATOM agencies and bodies and the European Institute of Innovation and Technology.

³³ Matthias Ruffert, European Administrative Law, Annual Report 2010 - Germany, in IUS Publicum Network Review, October 2011, page 2 and Jürgen Schwarze, Europäisches Verwaltungsrecht, 2005.

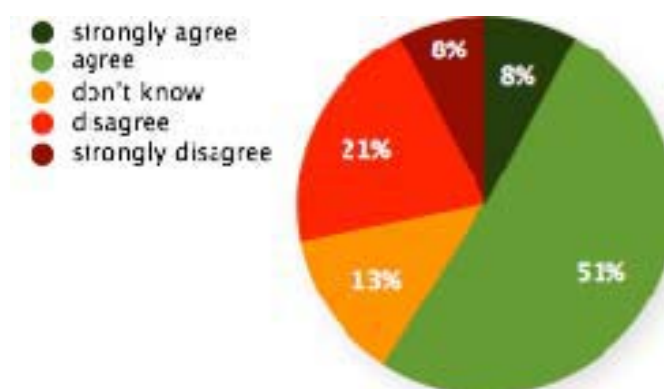
³⁴ Matthias Ruffert, European Administrative Law, Annual Report 2010 - Germany, in IUS Publicum Network Review, October 2011, page 3

³⁵ Jan Ziekow, Governance des Verwaltungsverfahren, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 102

different terminology.³⁶ General law on administrative procedure has the potential to motivate administrative innovation e.g. in the area of eGovernment ('VwVfG als Impulsgeber fuer E-Government').³⁷

Looking at survey feedback on this issue, 59% of survey respondents consider that a general law allows to test / promote innovative administrative procedures; 29% of respondents disagree.

Figure 9 - Our general law on administrative procedure has allowed us to test / promote innovative administrative procedures (leadership function of general administrative law).



2.2.2 Implications for the EU institutions, bodies, offices and agencies

Concerning 'enhanced legal and policy consistency' we also consider that a general law on administrative procedure covering the EU administration would help the EC to optimise the steering of EU policy and related legislative activity. Initial desk research confirms that different EC Directorates General (DGs) are struggling to ensure the coordination of specific policy or legislative development. For example, DG Legal Service' Annual Activity Report 2011 indicates constraints with regard to ensuring that all relevant DG's follow a standardised approach to preparing legislation. Similarly, the DG Legal Service' Annual Activity Report suggests difficulties with coordination on IT / eGovernment. Member State experience suggests that the presence of relevant provisions in a codified general law on administrative procedure strengthens the coordinating function of the concerned actors, thus contributing to harmonisation and helping to promote innovations. **This is to be elaborated on the basis of interviews with EC DG Legal Service, DG Informatics and DG Connect end September / early October.**

³⁶ Wolfgang Durner, Reform der Eröffnungskontrollen und des förmlichen Verfahrens II, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 238

³⁷ Kay Ruge, VwVfG und Informations- und Kommunikationstechniken, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 306

2.3 Enhanced compatibility between EU and Member State law

2.3.1 Member State experience with effectiveness

An EU general law on administrative procedure would reduce conflicts between administrative law introduced by EU sector-specific law and Member State administrative law. For example, commentators in Germany consider that EU administrative law is generally tailored according to the needs of sector-specific law thus resulting in different administrative law provisions depending on the sector. The Member States are then faced with the task to introduce different administrative law provisions depending on the sector whilst Member State administrative law is harmonised (EU administrative law 'pushes back' Member State administrative law despite the latter being of better quality).³⁸

2.3.2 Implications for the EU institutions, bodies, offices and agencies

With regard to the 'enhanced compatibility between EU and Member State law' a general law on administrative procedure at the EU level can be expected to result in efficiency and effectiveness benefits. More compatible legislation contributes to efficiency as the application of EU legislation is facilitated (e.g. more swift application as there is a reduced need to address any differences between EU and Member State law). Moreover, there are effectiveness benefits in terms of the enhanced application of EU law allowing for the achievement of related policy objectives.

An EU administrative law would also be in line with the recent OECD recommendations on regulatory policy and governance, e.g. recommendation 10: *'Where appropriate promote regulatory coherence through co-ordination mechanisms between the supra national, the national and sub-national levels of government. Identify cross cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of regulations.'*³⁹ Note that this recommendation is also addressed to supranational bodies with rule making powers.

2.4 Reduced burden - administrators, lawyers and judges

2.4.1 Member State experience with effectiveness

In Germany, general administrative law is considered to have contributed to reducing the burden on the administration in terms of applying administrative law. Moreover, harmonised administrative law between the federal and the regional level was found to

³⁸ Cornelia Rogall-Grothe, 35 Jahre Verwaltungsverfahrensgesetz, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, pages 26-27

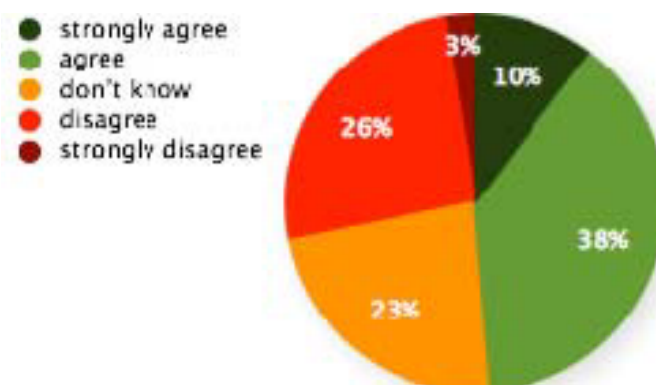
³⁹ OECD, Recommendation of the Council on regulatory policy and governance, 2012

reduce the burden on lawyers to familiarise themselves with different legal provisions.⁴⁰ Finally, with regard to the education of lawyers, German experience points to the motivation behind general administrative law comprising the contribution to a 'uniform basis for legal education of lawyers and civil servants'.⁴¹

Looking at survey feedback on this issue, 48% of survey respondents consider that a general law contributes to resource efficiencies as administrators can apply one set of rules and do not need to familiarise themselves with different sets of rules depending on the sector; 29% disagree. However, only 16% of survey respondents consider that a general law contributes to budget savings as clearer rules / common rules reduce the volume of complaints (in front of administration), Ombudsman cases or litigation at the courts; 49% disagree and 36% indicate that they 'don't know'.

Finally, 35% of survey respondents consider that a general law on administrative procedure has contributed to overall public administration cost savings as new public sector actors (e.g. new regulatory authorities, agencies etc.) are no longer required to elaborate general procedures for their institution but can operate on the basis of the general law on administrative procedure; 38% disagree and 28% indicate that they 'don't know'.

Figure 10 - Our general law on administrative procedure has contributed to resource efficiencies as administrators can apply one set of rules and do not need to familiarise themselves with different sets of rules depending on the sector.



⁴⁰ Hans-Jörg Birk, Wahrnehmung und Bedeutung des Verwaltungsverfahrenrechts aus anwaltlicher Sicht, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 48

⁴¹ Jens-Peter Schneider, Codification of administrative procedure in Germany, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 7

Figure 11 - Our general law on administrative procedure has contributed to budget savings as clearer / common rules have reduced the volume of number of complaints (in front of administration), Ombudsman cases, litigation at courts.

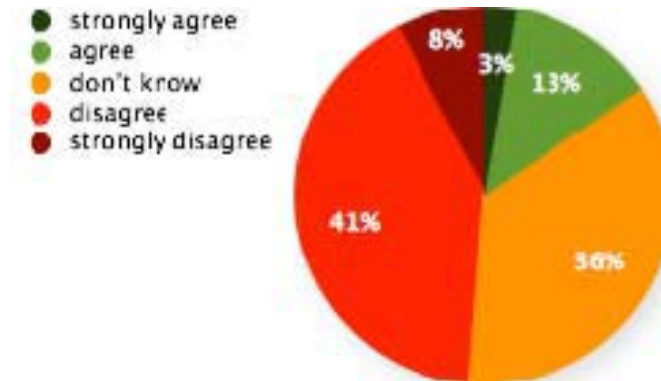
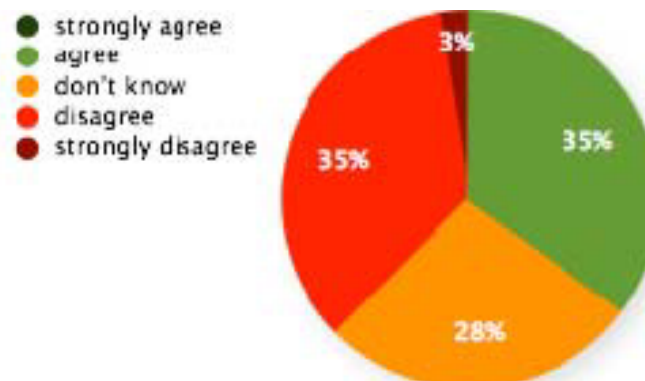


Figure 12 - Our general law on administrative procedure has contributed to overall public administration cost savings as new public sector actors (e.g. new regulatory authorities, agencies etc.) are no longer required to elaborate general procedures for their institution but can operate on the basis of the general law on administrative procedure.



2.4.2 Implications for the EU institutions, bodies, offices and agencies

To some extent, the potential for benefits in relation to a 'reduced burden for administrators, lawyers and judges' has already been addressed under section 2.2.1, since a general administrative law would free administrators and legal services from the requirement to elaborate and apply separate general provisions on administrative law for every EU institution, body, office or agency (thus allowing these actors to concentrate on their 'core business'). Beyond this, EU administrators, lawyers and judges would benefit from a general law on administrative procedure as they would no longer have to familiarise themselves with the different general provisions on administrative procedure included in the wide range of sector-specific legislation...

Moreover, a general law on administrative procedure can be expected to reduce the volume of litigation in front of the ECJ and thus reduce the need for the EC administration to dedicate time and resources to the preparation for and follow-up on litigation. The EC DG Legal Service Annual Activity Report 2011 notes 1168 new cases in 2011 **(how many are related to questions of general administrative law?)**.⁴² In principle, this DG has the role to support other DGs in the legislative process (preparation of new legislation) thus contributing to a more standardised approach - however, no detailed information is available on the effectiveness of this (indicators are provided but are of a rather general / qualitative nature).⁴³

A general law on administrative procedure at the EU level also implies a reduced burden on the ECJ judges: *'...as a consequence of the enlargement of the Union there are also reasons of practicality. When the Court consisted of six or even twelve judges, it was not unreasonably difficult to identify common legal principles. When the Union now consists of 25 Member States and the court therefore consists of 25 judges, each trained in his/hers own legal tradition, it will undoubtedly become much more difficult to identify common legal principles as a foundation for advancing European administrative law.'*⁴⁴

Concerning the growing number of different EU bodies, offices and agencies there is also substantial potential for resource efficiencies. Indeed, there are resource efficiencies at the set-up stage (e.g. when a new Agency is established) as new bodies, offices and agencies can use the general law of administration as a basis and do not need to 'start from scratch' when preparing administrative procedures concerning their organisation's interaction with the public. For example, a quick review of a selection of EU Agencies shows that all agencies have established somewhat different procedures governing access to documents.⁴⁵

Moreover, there are resource efficiencies during operation as application of rules can benefit from best practice generated under the same set of rules by more established bodies, offices and agencies.

⁴² EC DG Legal Service, Annual Activity Report 2011, 2012, page 4

⁴³ *'L'année 2011 a également donné l'occasion au Service juridique de poursuivre l'amélioration de certaines de ses procédures internes et administratives. Dans cette perspective, la Direction du Service a particulièrement insisté sur l'application des outils permettant d'intervenir le plus en amont possible dans le processus décisionnel de la Commission, y compris le cas échéant dans les groupes interservices préparant les évaluations d'impact des propositions législatives importantes, afin d'assurer la plus haute qualité des avis et des positions juridiques prises devant les juridictions.'* The following indicators are used to substantiate 'quality of legislation': 'The proportion of DIR K. responses to ISC's devoted to matters of legislative drafting: full compliance', 'Maximise the number of occasions on which DGs followed the drafting advice of the Legal Service', 'Minimise the number of cases arising from a lack of clarity of EU legislation' EC DG Legal Service, Annual Activity Report 2011, 2012, pages 5-9

⁴⁴ Statskontoret, Principles of Good Administration, 2005, page 77

⁴⁵ The review covered the following agencies: CPVO, EASA, ECDC, ECHA, EDA, EFSA, EMA, EUROPOL, OHIM.

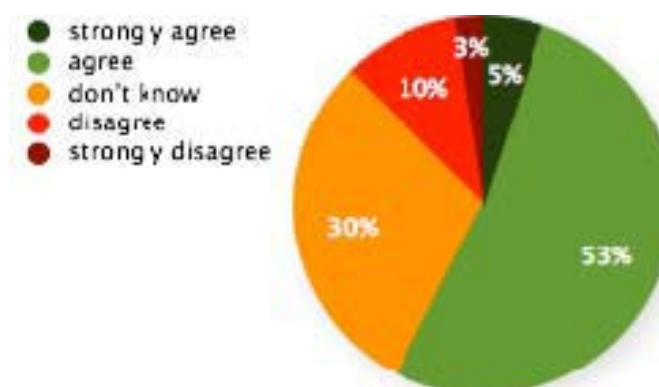
2.5 Contribution to legal research, best practice exchange

2.5.1 Member State experience with effectiveness

Experience in Germany shows that codification stimulates legal research. Indeed, the codification of general law on administrative procedure has increased the perceived importance of the codified law and thus stimulated researchers to review the codification. This legal research in turn contributed to an enhanced application of the law.⁴⁶ A similar experience is reported for the Czech Republic with codification only dating back to 2004,⁴⁷ and Norway.⁴⁸

58% of survey respondents agree that a general law contributes to resource efficiencies as the application of the law benefits from best practice experiences generated under the same set of rules by different institutions; 13% disagree.

Figure 13 - Our general law on administrative procedure has contributed to resource efficiencies as the application of the law benefits from best practice experiences generated under the same set of rules by different institutions.



2.5.2 Implications for the EU institutions, bodies, offices and agencies

We consider that there is a substantial potential for resource efficiencies in terms of a possible exchange of best practice experiences between different EU institutions, bodies, offices and agencies applying the same general law. The above example of the EU

⁴⁶ Ulrich Stelkens, Kodifikationssinn, Kodifikationseignung und Kodifikationsgefahren, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 277

⁴⁷ Josef Stasa, Codification of Administrative Procedure, National Report Czech Republic, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, pages 10-11

⁴⁸ Eivind Smith, Codification of Administrative Procedure, National Report Norway, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 15

Agencies having enacted separate rules concerning access to documentation indicates this potential as we can assume that it is easier to exchange and transfer experiences when applying the same rules as when operating different rules.

3. Case studies

This section presents the Member State case studies that were conducted to further illustrate the potential effects of a codified general law on administrative procedure at the level of the EU institutions.

Please note that the case studies are still ongoing at the time of submission of this report. However, initial feedback is included on the following case studies:

- 3.1 Coordinating general law on administrative procedure in Germany
- 3.2 Timeliness of administrative action in The Netherlands
- 3.3 Electronic communication in Sweden
- 3.4...
- 3.5...

Every case study is organised in two sub-sections:

- The current EU context
- The Member State example

3.1 Coordinating general law on administrative procedure in Germany

3.1.1 The current EU context

The EP Draft Report foresees '*The regulation to apply to the Union's institutions, bodies, offices and agencies*' (Recommendation 1). The principle of universal coverage of all EU administration implies the need for internal coordination when it comes to elaborating the general law on administrative procedure. Indeed, the general law needs to be well tailored to the requirements of the different 'components' of the EU administration. Moreover, once the general law is in force, internal coordination will also be required to ensure that any revisions / amendments continue to meet the requirements of the different EU institutions, bodies, offices and agencies.

Existing inter-institutional agreements on law making...

Preparing legislation within the EC can involve different DGs. Depending on the sector, a sector-specific DG is in charge of preparing new legislation. Moreover, the involvement of different sector-specific DGs with an interest in the new legislation might be required, e.g. new legislation in the area of the EU's Cohesion policy might require the involvement of DG Regional Policy, DG Employment, DG Agriculture and DG Mare, as all four DGs have an interest in the instruments deployed under the Cohesion policy (Structural Funds). In addition, DG Legal Service has a general supporting role, whilst DG Secretariat General has a general coordinating function.

A review of the DG Legal Service 2011 Annual Activity Report suggests that there are limitations in the extent to which DG Legal Service can fulfill its mandate of ensuring a common approach in the preparation of new legislation by different sector-specific DGs. **This section will be further developed on the basis of interviews with DG Legal Service (scheduled for end September / early October).**

3.1.2 The Member State example

In the German legal system, the federal level is responsible for federal-level administrative procedure, whilst the 16 regions are in charge of regional-level administrative procedure. Differences in general law on administrative procedure between the federal and the regional level (and between the regions) would cause difficulties in the application of the law, e.g. legal insecurity, different treatment depending on the region, limitations to judicial review: *'This concord is important as it is the condition for the reviewability of decisions based on the state APAs by the Federal Administrative Supreme Court securing uniformity of administrative procedural law in the German federal system'*.⁴⁹

To avoid any divergent developments, the concept of 'simultaneous legislation' has been coined,⁵⁰ implying the consistent development of administrative law between the federal and the regional level, thus ensuring that legal provisions at the two levels are developed in parallel, avoiding any differences.⁵¹ Compliance with this concept is ensured via well established mechanisms to ensure coordination between the federal level and the regional level.⁵²

Two mechanisms exist, namely the **Advisory Committee on General Administrative Law**,⁵³ and the **Conference of Federal and Regional Representatives dealing with General Administrative Law**.⁵⁴ Both structures are tasked with the ongoing review of general law on administrative procedure with a view to the possibility of and need for

⁴⁹ Jens-Peter Schneider, Codification of administrative procedure in Germany, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 9. Schneider refers to further literature on this: Walter Klappstein, *Moeglichkeiten und Grenzen einer Simultangesetzgebung: Darstellung am Beispiel der Verwaltungsverfahrensgesetze*, Zeitschrift fuer Gesetzgebung 1997, page 126

⁵⁰ The German term is 'Simultangesetzgebung'.

⁵¹ Heribert Schmitz, *Simultangesetzgebung von Bund und Ländern*, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, page 254

⁵² Cornelia Rogall-Grothe, *35 Jahre Verwaltungsverfahrensgesetz*, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, pages 26-27

⁵³ The German term is 'Beirat'. The English translation is taken from Michael Fehling, *Comparative Administrative Law and Administrative Procedure, Annual Report - 2011 - Germany*, in IUS Publicum Network Review, October 2011, page 8

⁵⁴ The German term is 'Konferenz der Verwaltungsverfahrensrechtsreferenten von Bund und Ländern'.

further codification.⁵⁵ Indeed, despite the long-standing experience with the German general law on administrative procedure (entry into force in 1977), the government notes that its efforts to ensure effective administrative procedures are of an ongoing nature, thus justifying the continuous review of its general law in cooperation with relevant stakeholders from implementation/practice, jurisdiction and academic research.⁵⁶

The Advisory Committee was established in 1997 under the Federal Ministry of the Interior. The Committee aims to advise the government on the development / reform of general law on administrative procedure. This is achieved via wide stakeholder involvement, as the Committee's ten members include representatives from industry, administration, the legal profession, justice and academia.

The Conference is in charge of drafting general law on administrative procedure for subsequent review (involving relevant administrations at the federal and regional level) and adoption by the relevant federal and regional government / parliaments.⁵⁷ The Conference involves federal and regional-level civil servants in charge of general law on administrative procedure, and the Conference (just as other sector-specific Conferences) is operated under the auspices of Germany's Federal Council (Bundesrat).

Coordination is considered a success, with simultaneous legislation having resulted in nearly identical general laws on administrative procedure at federal and regional level: *'Some state APAs do even just refer to the national APA. Other state APAs are comprehensive but repeat with only minor differences concerning their scope the provisions of the national APA'*.⁵⁸ The few existing differences are of rather 'cosmetic' nature, e.g. the region of Schleswig-Holstein has organised the provisions in a different order, and the region of Bavaria uses the term 'article' instead of 'paragraph'.⁵⁹ Moreover, the approach is considered effective in terms of achieving speedy administrative procedures. The Federal

⁵⁵ Heribert Schmitz, *Simultangesetzgebung von Bund und Ländern*, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, page 257

⁵⁶

http://www.bmi.bund.de/DE/Service/Glossar/Functions/glossar.html;jsessionid=8A66D070D21E61A54DFC84287D4A701F.2_cid231?nn=105094&lv2=296456&lv3=152346

⁵⁷ Heribert Schmitz, *Simultangesetzgebung von Bund und Ländern*, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, page 256

⁵⁸ Jens-Peter Schneider, *Codification of administrative procedure in Germany*, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 9. Schneider refers to further literature on this: Walter Klappstein, *Moeglichkeiten und Grenzen einer Simultangesetzgebung: Darstellung am Beispiel der Verwaltungsverfahrensgesetze*, *Zeitschrift fuer Gesetzgebung* 1997, page 126

⁵⁹ Hans-Jörg Birk, *Wahrnehmung und Bedeutung des Verwaltungsverfahrenrechts aus anwaltlicher Sicht*, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, page 48

level is served via uniform application of federal law in all regions; and the regional level is served via simplification of cooperation between authorities.⁶⁰

3.2 Timeliness of administrative procedure in The Netherlands

This case-study intends to explore the issue of administrative decision-making and provisions regarding timeliness in general law on administrative procedure. First we will take a look at the EU level, considering in particular the EP Draft Report.⁶¹ We will then look at the current situation in the EU and the need to include general administrative law provisions on timeliness in decision-making. Finally, we will take a closer look at the Dutch General Administrative Law Act and its response to delays in decision-making.

3.2.1 The current EU context

This section will start by looking at the European Code of Good Administrative Behaviour and highlights the provisions dealing with ensuring a timely response in EU administrative procedures. Following, this section will look at the EP Draft Report.⁶²

The Charter of Fundamental Rights of the European Union includes the right of good administration (Article 41) and the right to complain to the European Ombudsman against maladministration by the EU's institutions and bodies (Article 43). In Article 41, special reference is made to the right of a person to have 'his or her affairs handled impartially, fairly and within a reasonable time'. When in 1994 the EP decided on the regulations and general conditions that govern the performance of the European Ombudsman, it also called upon the Ombudsman to give effect to the citizen's right to good administration in Article 41 of the Charter.⁶³ Subsequently, the EP adopted the European Code of Good Administrative Behaviour in September 2001, defining the relations between EU institutions and the public.⁶⁴

Articles 17 and 19 of the Code of Good Administrative Behaviour specifically refer to the need for a timely response by the EU institutions:

- Article 17 - Reasonable time-limit for taking decisions: The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time-limit, without delay, and in any case no later than two months

⁶⁰ Heribert Schmitz, *Simultangesetzgebung von Bund und Ländern*, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, page 258

⁶¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGML%2BCOMPARL%2BPE-492.584%2B01%2BDOC%2BPDF%2BV0%2F%2FEN>, accessed in September 2012.

⁶² During the course of this study, this section will be further elaborated on by including additional desk research and expert interviews.

⁶³ Official Journal L 113/15, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1994:113:0015:0018:EN:PDF>, accessed in September 2012.

⁶⁴ <http://www.ombudsman.europa.eu/en/resources/code.faces>, accessed in September 2012.

from the date of receipt. The same rule shall apply for answering letters from members of the public and for answers to administrative notes which the official has sent to his superiors requesting instructions regarding the decisions to be taken. If a request or a complaint to the Institution cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. In that case, a definitive decision should be notified to the author in the shortest time.

- Article 19 - Indication of the possibilities of appeal: A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.

Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 230 and 195 of the Treaty establishing the European Community.

Both articles relate to the main steps taken by citizens when involved in an administrative procedure. Article 17 focuses on the first step in which the citizen initiates the procedure by requesting a decision to be taken. It also refers to the second stage of administrative procedure in which the applicant files a formal complaint to the administrative authority. Article 19 refers to the third step of administrative procedures in which the citizen's appeal possibilities and the time-limits applicable are addressed.

The above mentioned provisions indicate the need for the EU administration to meet time limits when taking decisions and when responding to complaints and appeals. Meeting time limits should enhance customer satisfaction, and at the same time ensure an effective workflow of the administration. However, defining merely the time limits or applying some form of (negative) administrative silence might not suffice in order to move the authorities to swiftly deal with citizen requests. Indeed, it is necessary to go beyond this with specific sanctions in case of failure to meet the time limits. This could 'motivate' the authority to meet the defined decision-making periods. An example could be a default penalty such as a fine that has to be paid to the citizen in case the administrative authority does not meet the limits. This could incite the authority to speed up decision-making and at the same time compensate the customer's dissatisfaction with the delay in public service provision.

When looking at the EP Draft Report, we see that Recommendation 4 on the rules governing administrative decisions deals with time limits. It specifically recommends the EC to indicate consequences to the failure to adopt a decision within the time-limit:

- 'Recommendation 4.2: on the acknowledgment of receipt: Requests for individual decisions shall be acknowledged in writing, with an indication of the time-limit for the adoption of the decision in question. The consequences of any failure to adopt the decision within that time-limit (administrative silence) shall be

indicated. In the event of a defective request, the acknowledgment shall indicate a deadline for remedying the defect or producing any missing document.’

- Recommendation 4.6 of the Draft Report further specifies provisions on time limits. It calls for decisions to be taken within reasonable limits and without delay. The limits should be fixed in the corresponding rules governing each specific procedure and in case no limit is established, it is automatically set to three months. Interesting in this recommendation is the second part. This part states that: ‘If no decision can be taken within that time-limit for objective reasons such as the need to provide time for the remedying of a defective request, the complexity of the matters raised, the obligation to suspend the procedure pending the decision of a third party, etc., the person concerned shall be informed thereof and the decision shall be taken in the shortest possible time.’

The above mentioned part touches upon an important aspect of general law on administrative procedure, namely the equality between the citizen and the administrative authority. The recommendation shows that the relationship between the actors is of a horizontal nature in which both have rights and obligations. The administrative authority is asked to comply with certain decision-making obligations, granting the citizen the right to obtain a response. At the same time, the citizen is obliged to deliver the required documentation, granting the administrative authority the right to extent the defined time limit in case of a defective request.

We now turn to looking at available data on the EU level dealing with inquiries of the European Ombudsman. This will give us an indication of the scale of the problem arising due to EU institutions failing to meet time limits specified in administrative procedures. We will use this information as a point of departure to introduce the debate on recommending relevant provisions in general law on administrative procedure at the EU level.⁶⁵

In many EU Member States, as well as on the EU institutional level there is limited empirical data available on how often institutions violate time limits. Nevertheless, the European Ombudsman provides annual data on the complaints received regarding the alleged maladministration of the EU institutions and bodies. In 2011, most inquiries concerned the EC (57%), EU Agencies (13%) and the European Personnel Selection Office (10%).⁶⁶ The data is divided according to the main types of alleged maladministration. The majority of the inquiries deal with issues of lawfulness (the application of substantive and/or procedural rules). Another important type concerns issues regarding access and requests for information but also the reasonable time limits for taking decisions. In 2011, 29 inquiries dealt with the timeliness of the decisions taken. If we take a look at the annual reports since 2000, we see that over the years the inquiries dealing with timely response issues did not change significantly (on average, some 53 cases per

⁶⁵ During the course of this study, this section will be further elaborated on by including additional desk research and expert interviews.

⁶⁶ Only 4% of the inquiries concerned the European Parliament. Source: European Ombudsman Annual Report 2011.

year over the 12 year period). This suggests that besides the relevant provisions indicating the time limits, additional measures, such as default penalties, might have a positive by stimulating the EU institutions to meet the time limits.

Figure 14 - Ombudsman statistics on alleged maladministration (number of cases concerning timeliness of decisions)⁶⁷



The European Ombudsman data does not provide us with a full picture of the scale of the problem. However, we can conclude from this that the problem exists and that EU institutions fail to meet time limits imposed on administrative procedure. The questions then can be asked whether the legislator in this case can contribute to solving this problem? If we approach this from the perspective of the citizen we could argue that it would be useful to provide the citizen with a tool to limit the damage in case the administrative authority fails to meet the time limits. If we approach this from the perspective of the authority we could either adapt the time limits to the reality of decision-making or we could simply push the authority to try to comply.

3.2.2 The Member State example

This section looks at the Dutch general law on administrative procedure in which interesting provisions are included in order to ensure that administrative authorities respond in a timely manner to the obligations laid upon them.⁶⁸

Since 1994, The Netherlands has had the General Administrative Law Act (GALA) (in Dutch: Algemene wet bestuursrecht or in short Awb). GALA defines the rules for decisions made by administrative authorities and creates the right of appeal to an administrative court.⁶⁹ It regulates administrative decision-making processes and provides for legal protection against the decisions taken by the authorities. When GALA was introduced in 1994, the Act consisted of 217 provisions. Today the Act has a total of 499 provisions. Some of these were foreseen from the beginning, while others are the

⁶⁷ European Ombudsman, Annual Reports for 2010, 2011

⁶⁸ During the course of this study, this section will be further elaborated on by including additional desk research and expert interviews.

⁶⁹ English version of the Act: <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2006/06/21/engelse-tekst-awb.html>

result of spill-over or shifted views on how the general administrative law should look like.⁷⁰

GALA is of particular interest to this case-study due to its modern time approach to relations between administrative authorities and citizens.⁷¹ This aspect has also been noted before when looking at current administrative procedures at the European level. GALA looks at the citizens and the administrative authorities as equal partners. In such a reciprocal relationship, consultation and communication are of great importance. Both parties need to take in account each other's interests and both parties have rights and obligations. This is translated in all the stages of the GALA procedure: in the first stage, in which the authority takes a decision on request of the citizen; in the second stage, in which the citizen expresses discontent through some form of formal complaint procedure; and in the third phase, when the administrative court has the last word after an appeal procedure. For example, when looking at the first step, the government is asked to deliver its motivation behind the decision taken (Article 3:46), the same way the citizen is requested to provide the right documentation for the application (Article 4:2). Or during the second phase when, before formally appealing the decision, the applicant files an objection and the disputed decision will be reviewed by the administrative authority (Article 7:11).

Provisions are in place that impose default penalties on administrative authorities in case of failure to make a decision within the relevant decision period (Article 4:17-4:20 of GALA).⁷² The time limits for individual decisions depend on the type of decision and have been laid out in a special law. This special law stipulates that after the time limit has passed, the government has an additional two weeks to take a decision. If after this period no decision has been taken, the administrative authority is obliged to pay a fine of €20 per day for the first two weeks, €30 per day for the next two weeks and €40 per day up to a maximum of 42 days. In the absence of a special time limit, GALA states that a reasonable period needs to be maintained which cannot exceed eight weeks.

In recent years, the Dutch Government has taken steps to improve the efficiency and effectiveness of the administrative decision-making procedures. An internal study in 2008 by the Dutch Ministry of the Interior and Kingdom Relations states that citizens accumulate up to 4 million hours of administrative burden due to hundred-thousands of formal complaints and appeals on a yearly basis. In order to decrease this burden and improve customer satisfaction, the government announced a special action plan in 2008 focussing on simplifying and digitalising procedures but also focussing more on pre-

⁷⁰ L.E. de Groot-van Leeuwen & M.T.A.B. Laemers, 'De Awb en 'de burger'', in T. Barkhuysen, W. den Ouden & J.E.M. Polak (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, Den Haag: Boom Juridische uitgevers 2010, p. 131-143.

⁷¹ L.E. de Groot-van Leeuwen & M.T.A.B. Laemers, 'De Awb en 'de burger'', in T. Barkhuysen, W. den Ouden & J.E.M. Polak (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, Den Haag: Boom Juridische uitgevers 2010, p. 131-143.

⁷² Tom Barkhuysen, Willemien den Ouden, Ymre E. Schuurmans, *The law on administrative procedures in The Netherlands*, contribution to International Academy of Comparative Law, Codification-Congress, 24-26 May 2012, National Reports Codification of Administrative Procedure, www.law.ntu.edu.tw/iacl/Download_en.aspx, page 3

mediation rather than judicialisation of conflicts and relationships.⁷³ Besides improving customer satisfaction, another motivation for the government to take action was the potential financial costs that complaints and appeals could bring to the administration due to the specific rules on decision periods.

When the special law on default penalties was introduced in October 2009 the main idea was to provide the citizen with a tool to push the administrative authority into action.⁷⁴ However, patience is asked considering the law gives the authority an additional two weeks to take a decision before receiving the financial penalty. Unfortunately, in the Dutch case there is not sufficient data available to state that the default penalty has increased the timely response of authorities.⁷⁵ However, from a customer satisfaction point of view, the provisions do increase the possibility of a speedy solution and in the 'worst case' scenario give the citizen a financial compensation. The provision can also have a broader impact, in the sense of pushing the administrative authority in general to keep to the time limits.

3.3 Public administration use of electronic communication means in Sweden

This case study focuses on the benefits of a general law on administrative procedure with regard to: Setting the framework for electronic communication (empowerment of eGovernment); Helping reduce the number of existing IT systems (rationalisation).

The following two paragraphs present our initial assumptions concerning the case study: Some of the EP Draft Report's recommendations imply the use of e-communications means (we will refer to this as eGovernment services).⁷⁶ These notably include, recommendations 4.2 on the acknowledgment of receipt; 4.5 on the right to have access to one's file; and 4.9 on the notification of administrative decisions. We thus assume that the general law would set a common framework for e-communication at the EU level.

We also assume that the absence of a general law has contributed to the current situation of IT system fragmentation within the EC. The spirit of a general law would encourage the development of common IT systems for all administrations as opposed to having multiple systems with the same functionality. This has been the case, for instance, in Germany, where the general law has contributed to the rationalisation of IT systems:

⁷³ M.M. Groothuis, 'De Awb en digitalisering', B.J. van Ettehoven, 'rechtseenheid als kwaliteitsvraagstuk', in T. Barkhuysen, W. den Ouden & J.E.M. Polak (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, Den Haag: Boom Juridische uitgevers 2010, p. 343-358.

⁷⁴ http://wetten.overheid.nl/BWBR0026450/geldigheidsdatum_20-09-2012, accessed in September 2012,

⁷⁵ A.T. Marseille, 'De Awb in cijfers', in T. Barkhuysen, W. den Ouden & J.E.M. Polak (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, Den Haag: Boom Juridische uitgevers 2010, p. 159-171.

⁷⁶ EP, Draft report with recommendations to the Commission on a Law of Administrative Procedure of the European Union, (2012/2024(INI)), 21 June 2012

*'General law on administrative procedure has the potential to motivate administrative innovation e.g. in the area of eGovernment.'*⁷⁷

3.3.1 The current EU context

Electronic communication between the EC and the EU citizens and businesses is only covered by sector-specific legislation. This is in contrast with some of the Member States where electronic communication is explicitly included in the general law on administrative procedure. For instance, Sweden's Administrative Procedure Act reads: *'The authorities shall also ensure that people are able to contact them by telefax and electronic mail, and that they can reply in the same way'*.⁷⁸

Similarly, in The Netherlands, the general administrative law includes provisions on electronic communication between the administration and interested parties.⁷⁹ Good practice might also be available from Portugal: *'digitalizing administrative procedure and activity is a very important goal of administrative law in recent years. E-procurement and the generalization of electronic proceeding in contract law is a paradigmatic area of our national law, with a very high standard comparing with other European regimes'*.⁸⁰

We now turn to the current deficiencies at EU level with regards to ICT that could be related to the absence of a general law on administrative procedure. In a recent Communication, EC vice-president Šefčovič explained the main results of an Interservice Task Force to study the current IT situation in the EC, with one of the main issues found being the *'considerable room for rationalising and standardising such information systems'*.⁸¹

The report points to a lack of IT leadership and internal communication as the main challenges. Regarding leadership, there is no central coordination or forum for discussion on strategy: *'responsibility for IT expenditure is spread out across the services. Roughly 40% comes from the Administrative Budget. The rest largely from operational budget lines managed by individual or groups of DGs'*.⁸² Moreover, EC internal communication appears insufficient: *'information systems developed under operational budget lines might also be of use to other*

⁷⁷ Jan Ziekow, Governance des Verwaltungsverfahrens, in Hermann Hill, Karl-Peter Sommermann, Ulrich Stelkens, Jan Ziekow, 35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven, 2011, page 102

⁷⁸ Ministry of Justice of Sweden. 2007. The 1986 Administrative Procedure Act. , Section 5, 5 July 2007, page 2

⁷⁹ Barkhuysen, T. and Ouden, W. 2012. In Ymre Schuurmans. The Law on Administrative Procedures in the Netherlands. Netherlands Administrative Law Library. April-June 2012, page 9

⁸⁰ Figueiredo Dias, José Eduardo. 2012. Codification of administrative procedure in Portugal, contribution to International Academy of Comparative Law, Codification-Congress. 24-26 May 2012, National Reports Codification of Administrative Procedure. www.law.ntu.edu.tw/iacl/Download_en.aspx, page 6

⁸¹ EC, Communication to the Commission of 7.10.2010 Getting the Best from IT in the Commission. SEC(2010) 1182 final

⁸² EC, Communication to the Commission of 7.10.2010 Getting the Best from IT in the Commission. SEC(2010) 1182 final

services of the Commission but we lack the means for identifying or adapting such processes.⁸³ The press has referred to this in strong words: 'It [the EC] employs 3,800 staff and spends €500m a year on systems so disparate that it is incapable of finding common cause between them'.⁸⁴

The result of the above, led to a redundancy of IT systems and functionalities and thus resource inefficiencies: 'For example there are 450 information systems spread over 23 DGs which treat the 'policy lifecycle'. There are 119 information systems dealing with grant management. In all it is estimated that there are over 2000 different information systems in DGs covering just over a dozen broad business categories'.⁸⁵

Looking at the specific areas selected for rationalisation, the area of 'external communication' is of interest: 'the Commission disposes of a fragmented number of systems to support its communication with the general public: there are more than 460 websites and 7,8 million pages; on average, 3 new sites are created each month and 40 new sites were launched in 2010 alone. However, only 8% of the sites attract 80% of all visits and more than half are rarely updated. The potential rationalisation gains appear self-evident. It is essential that all the web-pages produced by DGs are fully integrated within EUROPA, and follow the corporate editorial standards. This gives room to a potential rationalisation of 70% of the current systems in this area with estimated savings of more than 2M€ in the next 4 years'.⁸⁶

Finally, it is worth noting Mr Šefčovič's reflection - '[this challenging initiative] would need political support and steering at the highest level', considering the potential contribution that a general law on administrative procedure would have in terms of political support and steering.⁸⁷

Next steps: Interview DG DIGIT and DG Connect, on how a general law on administrative procedure would contribute to the rationalising exercise. Identify further quantitative (economic) evidence of the cost of the current situation.

In order to deal with the above issues (i.e. rationalising, harmonising, and resource efficiency), several bodies were established as of November 2010, namely a new ABM+IT Steering Committee, a High Level Committee on IT, and an Information Systems Project Management Board.

⁸³ EC, Communication to the Commission of 7.10.2010 Getting the Best from IT in the Commission. SEC(2010) 1182 final

⁸⁴ ComputerWeekly.com, European Commission prepares for cuts to sprawling €500m IT spend.24.03.11. <http://www.computerweekly.com/news/1280095517/European-Commission-prepares-for-cuts-to-sprawling-500m-IT-spend>, 2011, accessed on 18 September 12

⁸⁵ EC, Communication to the Commission of 7.10.2010 Getting the Best from IT in the Commission. SEC(2010) 1182 final

⁸⁶ EC, Communication to the Commission, Follow up to the Communication 'Getting the best from IT in the Commission' of 7 October 2010 - First decisions in the IT rationalisation process. 30 November 2011. page 4

⁸⁷ EC, Minutes of the 1931st meeting of the Commission held in Brussels (Berlaymont) on Thursday 7 October 2010 (morning). PV(2010)1931 final

Table 2 - The 'new' governance of IT at EC level (as of 1 November 2010)⁸⁸

Body	Members / participants	Responsibilities
ABM+IT Steering Committee	Representatives from 5 DGs representing a cross section of DGs or families of DGs which have recourse to IT funding under operational budgets or administrative budget lines.	Propose corporate IT strategy for the Commission to the College. Oversee the streamlining and harmonisation of business processes, set targets for achieving efficiency gains; review IT security etc.
High Level Committee on IT	Chaired by a Deputy Secretary General and comprising director level representation from the DGs represented on the ABM+ IT Steering Committee	Preparation of the work of the ABM+IT Steering Committee. Give effect to the Task Force's recommendations
Information Systems Project Management Board	Chaired by the Director General of DG DIGIT. The SG will provide the secretariat of this new body	Prepare guidelines on good IT project management; advise DGs on all new IT investments above €0.5m as well as identifying potential new corporate applications. The Board will signal issues requiring corporate guidance or decision to the High Level Committee on IT and for endorsement by the ABM+IT Steering Committee.

Next steps: Clarify to what extent the historical lack of IT governance at EC level may be linked to the non-existence of a clear mandate on this. Finally, assess whether a general law on administrative procedure would contribute / facilitate this mandate.

Preliminary findings indicate that the set up of smart eGovernment services at EC level would also contribute of the rationalising exercise. As mentioned in the DIGIT Management Plan 2012, *'the Commission must lead by example through: ... rationalising the portfolio of its mission-critical information systems supporting those business processes to deliver and operate smart e-government services that are innovative and user-centric'*.⁸⁹

In fact, the DIGIT Annual Report 2011 refers to two specific objectives that deal with the rationalisation, namely *specific objective 1.5 - 'Propose a convergence plan to streamline the overall number of information systems and to reduce the overall number of human resources involved in IT'* and *specific objective 1.6: 'Deliver methodological support for corporate business*

⁸⁸ EC, Communication to the Commission of 7.10.2010 Getting the Best from IT in the Commission. SEC(2010) 1182 final

⁸⁹ EC, DIGIT Management Plan 2012, Final Version, 14 December 2011, page 6

*process streamlining and IS rationalization by setting up the EA@EC Centre of Excellence...'*⁹⁰ Furthermore, other DIGIT result indicators show that there is still a long way to go, e.g. the result indicator for specific objective 2 - *number of new DGs adhering to IT Infrastructure Consolidation* shows that only 12 DGs and 3 Services had adhered to ITIC by December 2011.⁹¹ This explains DIGIT's key objective for 2012: *'effective contribution to the implementation of the IS rationalisation plan in order to streamline and reduce both the overall number of redundant information systems and the IT resources in conformity with the priorities agreed by the ABM+IT Steering Committee'*.⁹²

Whilst the EC has done much work in the past years for the promotion of eGovernment in the Member States, our preliminary findings indicate that further efforts are required at internal level, i.e. within the EC.⁹³ *'The European Commission has itself taken up eGovernment through eCommission... However, in the recent eCommission Communication it was indicated that the European Commission still has some way to go to be on a par with exemplary eGovernment systems in Europe'*.⁹⁴

Moreover, the report *'e-Commission 2006-2010: enabling efficiency and transparency'* ranks the EC at level 2 out of 4 on the e-government maturity scale, and sets the objective to *'reach, by 2010, the next level of e-government maturity, i.e. to implement an integrated Commission'*.⁹⁵ The mid-term review of the e-Commission 2006-2010 report showed some progress: *'Their [private individuals and organisations] perception of the e-government maturity of the Commission is close to 2.7, compared with 2 which was the level in 2005 and thus is on track towards the objective of level 3 to be reached by 2010'*.⁹⁶ However, the EC is still half-way from its target, e.g. one of DIGIT's 2011 objective reads: *'to draw up a new e-Commission*

⁹⁰ EC, 2011 Annual Activity Report, Directorate-General for Informatics (DIGIT), Final Version, 20 March 2011, page 5

⁹¹ Specific objective 2: Provide the Commission, and whenever appropriate other European Institutions and bodies, with the high quality state-of-the-art corporate IT infrastructure solutions and e-services, support services and telecommunications facilities required for their business processes. EC, DIGIT Management Plan 2012, Final Version, 14 December 2011, page 12

⁹² EC, DIGIT Management Plan 2012. 14.12.11. Final Version

⁹³ During the past decade, the Commission has drafted its main strategies and plans in relation to eGovernance applied at internal level (i.e. for the EC), through several documents: *'e-Commission 2001-2005'*, *'e-Commission 2006-2010'*, and *'e-Commission 2001-2015'*. However, and so far, the contractor has not found any external evaluation of such plans, and also, the contractor has not found published online the last e-Commission 2001-2015.

⁹⁴ EC, Commission staff working document. Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All. COM(2006) 173 final.

http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2006/sec_2006_0511_en.pdf, pages 17-18

⁹⁵ EC, e-Commission 2006-2010: enabling efficiency and transparency.

http://ec.europa.eu/dgs/informatics/ecom/comm/doc/ecom-2006-2010_cs_en_v414_postcis.pdf, page 8

⁹⁶ EC, e-Commission 2006-2010: Mid-Term Review.

http://ec.europa.eu/dgs/informatics/ecom/comm/doc/c_2008_7961_1_en_communication.pdf, page 4

strategy for 2011-2015, enabling the Commission to reach Level 4 (Transformed Government) in the eGovernment maturity scale'.⁹⁷

DIGIT explicitly mentions the need to work further at internal level: 'while promoting the use of ICT in society as a whole through the i2010 strategy, the Commission intends to lead by example by applying to its own administration the European information society policy in e-government'.⁹⁸

Next steps: Clarify the current state of the e-government maturity scale of the EC. Note, that the contractor has not found (online) the e-Commission strategy for 2011-2015. The contractor has requested interviews with DIGIT for this purpose.

An assessment of the impact of eGovernment on economy and society at the EU level notes a 'considerable impact in financial terms (e.g. tens of billions of euros potential savings for taxpayers) as well as in non-financial terms (e.g. higher public service quality, more transparency, increased user satisfaction, inclusion and involvement) and relevant for virtually all in society and economy. After all, public services concern 470 million citizens, 20 million private businesses and several 10,000s administrations in Europe. Governments in the EU25 spent on average 45% of GDP in 2004 and procured about 16%'.⁹⁹

The same report mentions the economic benefit in dealing with budget pressures in Germany, and in reducing the administrative burden in The Netherlands:

- 'In Germany, the costs of bureaucracy make up between 2 and 5 percent of the German Gross National Product and have risen more than 25% in the last eight years. However, investments in the German BundOnline 2005 initiative suggest that in some cases it will not take very long for investments in eGovernment to be amortised given that the investment costs of EUR 1.65 billion can be set against annual savings of EUR 400 million. For example, an official notice costs EUR 7.50 to process by conventional means, whereas it costs only EUR 0.17 when done electronically. Similarly, the use of electronic identity management, in this case a digital signature, by the Federal Insurance Institution for Salaried Employees saves EUR 1.90 in administrative costs on every document processed'
- 'Reducing Administrative Burden Evidence shows indeed that administrative costs, burdening businesses and thus reducing their competitiveness, make up significant amounts. In the Netherlands, for example, the total administrative cost is estimated at €16 billion per year, including 4 billion administrative costs for tax-related obligations (in 2002). The bureaucracy costs for small and medium size

⁹⁷ EC, 2011 Annual Activity Report, Directorate-General for Informatics (DIGIT), Final Version, 20 September 2011, page 5

⁹⁸ EC, http://ec.europa.eu/dgs/informatics/ecommm/index_en.htm. Accessed on 18 September 2012

⁹⁹ EC. 2006c. Commission staff working document. Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All. COM(2006) 173 final. http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2006/sec_2006_0511_en.pdf, page 3

companies significantly reduce their profits. By reducing these costs, eGovernment can help companies keep up with global competition. The Top of the Web survey found that companies can save €10 per VAT declaration by making these online, which translates into a potential of hundreds of millions of euros savings across Europe'

3.3.2 The Member State example

Note Sweden's position as one of the world leaders in terms of e-Government Readiness according to the United Nations e-Government Survey 2008,¹⁰⁰ and among the top five countries in most eGovernment benchmarks.¹⁰¹

Sweden's Administrative Procedure Act (Section 5) reads: *'The authorities shall receive visits and accept telephone calls from people. Where particular times for this have been decided, the public shall be informed about them in an appropriate way. The authorities shall also ensure that people are able to contact them by telefax and electronic mail, and that they can reply in the same way...'*

Areas for follow up with the Swedish authorities:

- Some initial leads for further follow-up: Sweden's eGovernment Delegation is to submit a proposal by March 2014 on how the work on eGovernment can continue in a longer-term perspective.¹⁰² Under its remit the Delegation is to identify regulations that inappropriately prevent electronic exchanges of information.¹⁰³
- Simplifying businesses' administration: Businesses often submit the same information to different agencies. To reduce the administrative burden on businesses, the Delegation considers that these businesses should only have to send information to one agency on one occasion. To obtain information, an agency must first contact other agencies within the current regulatory framework before turning to the business itself. The Delegation considers it important that the Swedish Companies

¹⁰⁰ UN. 2008. United Nations e-Government Survey 2008. From e-Government to Connected Governance. New York 2008.

<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028607.pdf>

¹⁰¹ WEF Global Competitiveness Index 2009-2010, ranking=4; WEF Networked Readiness Index 2008-2009, ranking=2; EIU eReadiness Ranking 2009, ranking=2; EC eGovernment benchmark 2009 (Avail./Soph.), ranking=5/3

¹⁰² the eGovernment Delegation (the Delegation) is the Swedish public body (appointed in 2009 for 5 years) responsible for steering eGovernment in the public sector. Its remit includes coordination of IT developments, monitoring the impact on stakeholders, and IT rationalising efforts. The Delegation reports to the he Ministry for Local Government and Financial Markets which is the ultimate responsible on the Swedish eGovernment policy. The Delegation consists of Directors-General from the largest and most IT-intensive agencies.

¹⁰³ Swedish Government Inquiries, As simple as possible for as many as possible - the way to more effective eGovernment. Summary of report (SOU 2011:67) by the eGovernment Delegation.

Registration Office be given the task of carrying out a project as soon as possible to reduce companies' reporting burden and make it easier for them to supply data.¹⁰⁴

- *'In 2000, Sweden set the policy goal to become the first country to be an 'Information Society for All'. Since then, the Swedish Government's priority tasks have been to enhance public confidence in IT, help to improve user skills and foster access to IT services. According to the 24-hour Public Administration Strategy, public information and services should, to the maximum degree, be electronically available 24 hours a day, seven days a week'.¹⁰⁵*
- *'The Swedish Government announced in December 2006 that as from July 2008, all public agencies shall process all incoming and outgoing invoices electronically.'* 106
- *Coordination of IT standardisation efforts: 'The Delegation is to coordinate the central government administration's IT standardisation work on eGovernment. The Delegation is to ensure that method and expert support on IT standardisation issues is provided in central government administration, even with regard to concept standards. This work should be carried out in collaboration with the Swedish Association of Local Authorities and Regions. Coordination of IT standardisation efforts is to promote the use of open standards. The Delegation is to take into account IT standardisation efforts underway at international level'.¹⁰⁷*

¹⁰⁴ Swedish Government Inquiries, As simple as possible for as many as possible - from strategy to action for eGovernment, 2010

¹⁰⁵ EC, eGovernment Factsheets. eGovernment in Sweden. January 2010. <http://www.epractice.eu/en/factsheets>, page 11

¹⁰⁶ EC, eGovernment Factsheets. eGovernment in Sweden. January 2010. <http://www.epractice.eu/en/factsheets>, page 20

¹⁰⁷ Swedish Government Enquiries, 2009, The eGovernment Delegation. Strategy for the government agencies work on eGovernment. Summary of SOU 2009:86, page 21

ANNEXES

Annex 1 - Sources not quoted in the main text

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Annex 2 - Survey questionnaire

Identification details

Please note that the focus of this study is on the effectiveness of general laws on administrative procedure, i.e. the achievement of intended results as experienced in your Member State or region.

This introductory section aims to collect information on your institution and Member State legal context.

1. Please provide information on your institution.

Ombudsman (national) University (law) University (political sciences)

Ombudsman (regional) University (public administration sciences)

Other (please specify)

2. Please indicate the title and date of entry into force of your general law on administrative procedure.

Page 1

The effectiveness of your general law on administrative procedure

This section aims to obtain your assessment of the effectiveness of the general law on administrative procedure in your Member State or region. Please note your agreement with the statements below, and please also use the text boxes if you wish to provide any qualitative or quantitative evidence to support your assessment.

3. Our general law on administrative procedure has contributed to enhance the reputation of government / public administration as clearer rules / codification contribute to legitimacy.

Strongly agree Agree Don't know Disagree Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

4. Our general law on administrative procedure has contributed to enhance legality as procedures are legislated and are not 'made' by the courts.

Strongly agree Agree Don't know Disagree Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

Page 2

5. Our general law on administrative procedure has contributed to deregulation as general provisions on administrative procedure are no longer required in sector-specific legislation.

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

6. Our general law on administrative procedure has contributed to harmonisation / rationalisation as the general provisions have triggered harmonised provisions in sector-specific law.

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

7. Our general law on administrative procedure has allowed us to test / promote innovative administrative procedures (leadership function of general administrative law).

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

8. Our general law on administrative procedure has contributed to budget savings as clearer / common rules have reduced the volume of number of complaints (in front of administration), Ombudsman cases, litigation at courts.

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

9. Our general law on administrative procedure has contributed to resource efficiencies as administrators can apply one set of rules and do not need to familiarise themselves with different sets of rules depending on the sector.

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments - qualitative or quantitative evidence to support the above assessment.

10. Our general law on administrative procedure has contributed to overall public administration cost savings as new public sector actors (e.g. new regulatory authorities, agencies etc.) are no longer required to elaborate general procedures for their institution but can operate on the basis of the general law on administrative procedure.

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments - qualitative or quantitative evidence to support your assessment.

Your recommendation for the level of the European Union

The final question seeks your views on the desirability of enacting a general law on administrative procedure at the level of the European Union institutions, bodies, offices and agencies.

12. We consider that a general law on administrative procedure at the level of the EU institutions would bring about benefits similar to those experienced in the Member States.

Strongly agree
 Agree
 Don't know
 Disagree
 Strongly disagree

Comments